No. 90-1738

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Thomas H. Nelson*
James C. Paine
STOEL RIVES BOLEY
JONES & GREY
900 SW Fifth Ave., Suite 2300
Portland, OR 97204
Telephone: (503) 294-9281

Donald R. Murray, Jr.
MURPHY, ROBINSON,
HECKATHORN & PHILLIPS
431 First Ave., West
PO Box 769
Kalispell, MT 59903
Telephone: (406) 752-6644

Counsel of Record

QUESTIONS PRESENTED

May Montana taxing authorities constitutionally impose beneficial-use property taxes on Petitioners, who are alleged users of federally owned high-voltage (500 kilovolts ("kV") and higher) transmission facilities,--

1.--but at the same time exempt private users of state-owned railroad rights-of-way from beneficial-use taxes?

2.--in a manner that imposes higher beneficial-use taxes on Petitioners for the portions of the lines used than they would have paid had they owned such portions outright?

3.--in a manner that erroneously assumes that all power owned by Petitioners flows over taxable federal facilities and that none flows over nontaxable federal facilities, thereby imposing disproportionate and discriminatory taxes on Petitioners?

4.--when Petitioners do not possess, operate, maintain, control, or have physical access to the facilities on account of which such beneficial-use taxes are imposed?

5.--which facilities have the greatest impact upon interstate commerce, but at the same time exempt from taxation those federal transmission facilities that serve primarily intrastate and local interests?

6.--when pursuant to express congressional directive Montana's local taxing districts have already been fully compensated for all impacts occasioned by the construction and operation of the new federal transmission facilities?

PARTIES BELOW AND RULE 28.1 LISTING OF AFFILIATES

Petitioners below were Pacific Power & Light Company ("Pacific Power"),[1] Portland General Electric Company ("PGE"),[2] Puget Sound Power & Light Company ("Puget Sound"),[3] The Washington Water

---

[1] Pacific Power & Light Company is an assumed business name for a portion of the electric utility operations of PacifiCorp, an Oregon corporation. The remainder of PacifiCorp's electric utility operations are carried out under the assumed business name of Utah Power & Light Company. Pacific Power is affiliated with the following direct or indirect subsidiaries that are not wholly owned by PacifiCorp: North American Energy Services Company; Eye Dentify, Inc.; Equitec Financial Group, Inc.; Flight Dynamics, Inc.; NERCO, Inc.; Black Swan Gold Mines Ltd.; LeClair Consolidated Mines Co.; Vol Mines, Ltd.; Black Lake Pipe Line Company; Security Offshore Insurance, Ltd.; Pacific Telecom, Inc.; International Satellite, Inc.; Pacific Satellite, Inc.; FTC Communications, Inc.; Pacific Telecom Cable; Gem State Utilities Corporation; ICC Communications Holdings, Inc.; and Northwestern Telephone Systems, Inc.

[2] Portland General Electric Company ("PGE"), an Oregon corporation, is a wholly owned subsidiary of Portland General Corporation ("PGC"), an Oregon corporation. PGE is affiliated with the following direct or indirect subsidiaries that are not wholly owned by PGC: North American Energy Services Company ("NESCO") and Bonneville Pacific Corporation ("B-Pac"). PGC owns the interest in B-Pac and PGE owns the interest in NESCO. PGE has an indirect partnership interest in the following partnerships: Frontier First Partners and Cornerstone Columbia Development Company.

[3] Puget Sound Power & Light Company, a Washington corporation, is affiliated with only two direct or indirect subsidiaries that are not wholly owned: North American Energy Services Company and Hydro West Group, Inc., both of which are Washington corporations.

Power Company ("Water Power"),[4] and the Montana Power Company ("Montana Power").[5] Defendants below, in addition to the Department of Revenue ("Department"), were: Jefferson County; Susan Miller, Treasurer of Jefferson County; Broadwater County; Irene Kemmer, Treasurer of Broadwater County; Powell County; Dalice M. Cook, Treasurer of Powell County; Granite County; Harriet L. Ryan, Treasurer of Granite County; Missoula County; Fern Hart, Treasurer of Missoula County; Sanders County; June M. Thayer, Treasurer of Sanders County; and Ed Argenbright, Superintendent of Public Instruction. All of the defendants were represented by counsel for the Montana Department of Revenue.

---

[4] The Washington Water Power Company, a Washington corporation, has a direct subsidiary, Pentzer Corporation, which has three subsidiaries that are not wholly owned: The Limestone Company, Inc.; Itron, Inc.; and North American Services Company. Another Pentzer subsidiary, WP Energy, Inc., owns a one-third interest in a Canadian corporation, NW Energy Corp.

[5] The Montana Power Company, a Montana corporation, has only one indirect subsidiary corporation that is not wholly owned: Intermountain Digital Network, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW AND RULE 28.1 LISTING OF AFFILIATES ii

TABLE OF CASES AND AUTHORITIES vi

PETITION 1

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 3

A. The Facts. 3

B. The Proceedings in State District Court. ... 5

C. The Montana Supreme Court Decision. ... 6

REASONS FOR GRANTING THE WRIT 8

A. Introduction: Montana Courts' Refusal to Provide Judicial Review. 8

B. The Montana Beneficial-Use Statute Discriminates Against Those Who Contract with the United States. 9

C. The Montana Tax Imposes Greater Taxes on U.S. Contractors than Are Imposed on Other Taxpayers. 11

D. The Montana Tax Discriminates Against Interstate Commerce and Those Who Contract with the United States. 14

E. Other Important Constitutional Issues Raised in *Pacific Power I* and *PGE* Are Also Before the Court. 18

1. Beneficial-Use Taxation in Absence of Possession, Custody, Control, or Access. 18

2. Discrimination Against Interstate Commerce by Restricting Taxes to 500-kV and Higher Facilities. 19

3. Preemption of Montana's Beneficial-Use Tax on Federal 500-kV Transmission Facilities. 20

4. Other Claims. 21

CONCLUSION 22

TABLE OF CASES AND AUTHORITIES

Page

Cases

Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979) 21

City of Detroit v. Murray Corp. of America, 355 U.S. 489 (1958) 19

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) . 20

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 19

Mayo v. United States, 319 U.S. 441 (1943) 19

Pacific Power & Light Co. v. Montana Dep't of Revenue, ___ Mont. ___, 804 P.2d 397, *reh'g denied*, ___ P.2d ___ (1991) . . . . . *passim*

Pacific Power & Light Co. v. Montana Dep't of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990) 1, 3, 4, 6, 11, 18

Phillips Chem. Co. v. Dumas Indep. School Dist., 361 U.S. 376 (1960) 6, 7, 9, 10

Portland Gen. Elec. Co. v. Montana Dep't of Revenue, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990) 1, 2, 3, 4, 6, 11, 15, 16, 17, 18

Tradesmens Nat. Bank v. Oklahoma Tax Comm'n, 309 U.S. 560 (1940) 6

United States v. City of Detroit, 355 U.S. 466 (1958) . 19

United States v. City of Manassas, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988) 6, 7, 10, 11

United States v. County of Allegheny, 322 U.S. 174 (1944) 19

United States v. County of Fresno, 429 U.S. 452 (1977) 14

United States v. Dep't of Revenue, 191 F. Supp. 723 (N.D. Ill. 1961) 10

United States v. Township of Muskegon, 355 U.S. 484 (1958) 19

Washington v. United States, 460 U.S. 536 (1983) 6

Constitutional Provisions

Article I, section 8, clause 3, U.S. Constitution . 3, 14, 20, 22

Article VI, clause 2, U.S. Constitution 3, 9, 14, 22

Fourteenth amendment, U.S. Constitution . . . 21, 22

Statutes and Rules

15 U.S.C. § 391 (1982) 21

16 U.S.C. § 838(b) (1982) 3

16 U.S.C. § 839e(m) (1982) 20

28 U.S.C. § 1257 (1982) 2

28 U.S.C. § 2101(c) (1982) 2

Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988) 2

Mont. Code Ann. § 15-8-601 (1989) 5

Mont. Code Ann. § 15-24-1203 (1989) 9, 10

Mont. Code Ann. § 35-1-203 (1989) 7

Mont. Code Ann. § 35-2-101 (1989) 7

Va. Code Ann. § 58.1-3502 11

U.S. Supreme Court Rule 20.1 2

Treatises and Miscellaneous

Amdur, *Property Taxation of Regulated Industries*, 40 Tax Lawyer 339 (1987) 12

Keesling, *Property Taxation of Leases and Other Limited Interests*, 474 Calif. L. Rev. 470 (1959) . 19

PETITION

Petitioners pe on this Court for a writ of certiorari to the Montana Supreme Court to review the opinion in *Pacific Power & Light Co. v. Montana Dep't of Revenue*, ___ Mont. ___, 804 P.2d 397, *reh'g denied*, ___ P.2d ___ (1991).

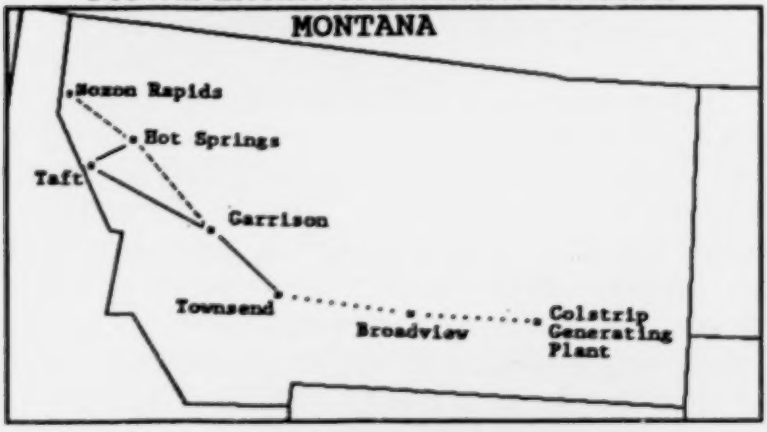
OPINIONS BELOW

The order of the District Court for Lewis and Clark County, Montana, is unreported and is reprinted in the Appendix at A48. The opinion of the Montana Supreme Court is reported at 804 P.2d 397 and is also reprinted at A11. A timely petition for rehearing was filed alleging that the Montana Supreme Court's opinion was based upon two erroneous facts. That petition was also denied; copies of both the petition and the order denying it are reprinted at A21 and A47, respectively.

This litigation is an extension of two prior opinions of the Montana Supreme Court, *Pacific Power & Light Co. v. Montana Dep't of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990), reprinted at A58 ("*Pacific Power I*"), and *Portland Gen. Elec. Co. v. Montana Dep't of Revenue*, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990), reprinted at A83 ("*PGE*"). Unlike the opinion that is the subject of this petition, each of those two earlier decisions dealt only with fractions of the overall controversy; specifically, *Pacific Power I* was limited to challenges to the imposition of 1984 beneficial-use taxes on the federal "Montana Intertie," which consists of federal 500-kV transmission facilities from Townsend, Montana, to Garrison, Montana, and

PGE was limited to the imposition of 1985 beneficial-use taxes on the federal Hot Springs-to-Idaho-border 500-kV transmission facilities. Those two prior cases did not address three of the constitutional issues presented here. The locations of the federal facilities are depicted below:

Federal Electric Transmission Facilities



———— = Federal 500-kV Facilities
———— = Federal 230-kV Facilities
. . . . . = Private 500-kV Facilities

JURISDICTION

The opinion of the Montana Supreme Court was issued on January 10, 1991, and the petition for rehearing was denied on February 14, 1991. Under U.S. Supreme Court Rule 20.1 and 28 U.S.C. § 2101(c) (1982), a petition for certiorari is due on May 15, 1991. Jurisdiction rests on 28 U.S.C. § 1257 (1982), as amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

STATEMENT OF THE CASE

A. The Facts.

Together for the first time in this petition are all of the significant constitutional challenges to the State of Montana's imposition of state beneficial-use property taxes on congressionally authorized[6] high-voltage electric power transmission lines that are owned, maintained, and operated exclusively by the Bonneville Power Administration ("BPA"), a federal power marketing agency. Specifically, in addition to presenting three significant new questions regarding the constitutionality of Montana's imposition of beneficial-use taxes under the Supremacy Clause[7] and the Commerce Clause,[8] this petition also presents the constitutional challenges the Montana Supreme Court denied in 1989 in *Pacific Power I* and *PGE*.

In 1983 the Montana Legislature amended its beneficial-use tax statute for the purpose of imposing taxes upon private "users" of the federal government's highest voltage electric power transmission facilities in Montana, *i.e.*, facilities of 500 kV or higher. The Montana beneficial-use statute is reprinted at A10. Under the BPA transmission services agreements relied on by the Department to impose the taxes, Petitioners receive and pay for a service from the federal government. They have no right to operate, control,

---

[6] Section 4 of the Federal Columbia River Transmission System Act, 16 U.S.C. § 838(b) (1982), reprinted at A5.

[7] Article VI, clause 2, of the U.S. Constitution.

[8] Article I, section 8, clause 3, of the U.S. Constitution.

maintain, or even physically access any of BPA's transmission facilities. In 1987, the State again amended its beneficial-use statute, this time to favor those who contract with the state by *exempting* from beneficial-use taxation private users of *state*-owned railroad rights-of-way. A10.

After the Montana Supreme Court issued its *Pacific Power I* and *PGE* decisions upholding the beneficial-use tax over the Townsend-Garrison and Hot Springs-Idaho border federal transmission facilities (*see* map, *supra* at 2), the Department of Revenue ("Department") changed its methodology for determining beneficial-use taxes on federal transmission facilities. Specifically, in tax year 1986 the Department began employing a method that necessarily inflicts upon Petitioners a higher tax on the portion of the federal facilities used to provide transmission service than Petitioners would have paid had they owned such portion outright. The Department continues to use this discriminatory methodology today.

The completion of the last segment of 500-kV transmission facilities in 1986–the segment from Garrison to Taft (*see* map, *supra* at 2)–also resulted in a separate constitutional challenge.[9] The Department calculated the tax on those facilities by assuming erroneously that all of Petitioners' power transmitted between those points would flow over taxable 500-kV federal facilities and that accordingly none would flow over parallel tax-exempt lower voltage federal facilities.

---

[9] The Garrison-Taft facilities were not involved in the prior *Pacific Power I* and *PGE* decisions.

The result of this erroneous assumption was to impose disproportionate and discriminatory taxes on Petitioners.

B. The Proceedings in State District Court.

Complaints raising the constitutional challenges set forth above were filed with the Lewis and Clark County District Court in January 1986 (1985 tax year), in January 1987 (1986 tax year), and in January 1988 (1987 tax year). Upon the filing of the third complaint, the District Court consolidated the proceedings for those three years. Discovery was well underway when, in May 1988, the Department revised its assessments for tax years 1986 and 1987. Because Montana law appears to require that revisions to prior assessments be taken to the State Tax Appeal Board ("STAB") in the first instance,[10] Petitioners sought review of the revisions before STAB and simultaneously moved to stay the District Court proceedings pending the STAB determination. The District Court, however, denied the stay and proceeded to hear the constitutional challenges before the STAB proceedings commenced. During the seven-day trial, the District Court received into evidence depositions and heard the live testimony of expert witnesses related to all constitutional issues; in addition, the court admitted into evidence documents related to all aspects of transmission of power over the federal facilities and the changes in the methodology employed by the Department in calculating beneficial-use taxes on such facilities. At the conclusion of the trial, the District Court issued an

---

[10] *See* Mont. Code Ann. § 15-8-601 (1989).

order upholding the taxes in the face of all challenges. A48.

C. The Montana Supreme Court Decision.

As noted above, Petitioners preserved all of their constitutional challenges in their appeal to the Montana Supreme Court. In the instant litigation Petitioners focused particularly upon three constitutional arguments that had not been addressed by the Montana Supreme Court in the prior *Pacific Power I* and *PGE* litigation, *viz.*, (1) that the state's exemption of its own property from beneficial-use taxation violated the prohibition against states' discriminating against the federal government or those with whom it deals;[11] (2) that the Department's new methodology, which has come to be referred to as the "half at the bottom" approach, unconstitutionally discriminated against both the United States and Petitioners; and (3) that the Department's failure to recognize the physical fact that a significant portion of Petitioners' electric power transmitted west of Garrison, Montana, flows over tax-exempt federal transmission facilities resulted in imposing an undue and discriminatory burden on interstate commerce and upon them.[12] The

---

[11] *See Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960) ("*Phillips*"); *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988) ("*Manassas*").

[12] When a claim of discrimination is raised, the judiciary must conduct a thorough, searching inquiry into "'the whole tax structure of the state.'" *Washington v. United States*, 460 U.S. 536, 542 (1983) (quoting *Tradesmens Nat. Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940)). In spite of being informed explicitly of these requirements, the Montana judiciary refused even to consider the two significant new constitutional claims.

Montana Supreme Court entertained only the first of these three new constitutional challenges,[13] erroneously holding that issues (2) and (3) were then before STAB. The Montana Supreme Court held that Petitioners and the exempt users of state-owned railroad rights-of-way were not "similarly situated" under the *Phillips* and *Manassas* decisions because the Montana Supreme Court believed that the exempt users of state property were nonprofit corporations. A17.

Upon receiving the decision of the Montana Supreme Court, Petitioners sought reconsideration in order to correct the two errors, *viz.*, that the private users of state property were nonprofit corporations and that two constitutional issues were before STAB. A21. Addressing the first error, the petition for reconsideration had attached to it a certified copy of articles of incorporation and merger that had been filed with the Montana Secretary of State by one of the exempt users of state-owned railroad rights-of-way, Rarus Railway Company. Those documents establish conclusively that Rarus Railway Company is a for-profit entity. *See* A32.[14] Addressing the second error, Petitioners referred the court to the STAB decision that earlier had been lodged with the court;

---

[13] Issue (4), dealing with whether beneficial-use taxes could legitimately be imposed on the Garrison-Taft facilities in tax year 1986, does not raise significant constitutional issues. That question is now before the Lewis and Clark County District Court on an appeal from the State Tax Appeal Board.

[14] The statutory reference in the Certificate of Incorporation to "Section 35-1-203, Montana Code Annotated," A32, is to Montana's for-profit corporation act. *Nonprofit* corporations are governed by Mont. Code Ann. § 35-2-101, *et seq.* (1989).

that decision nowhere addressed or resolved any constitutional issues. *See* A92. On February 14, 1991, the Montana Supreme Court denied reconsideration without comment. A47.

REASONS FOR GRANTING THE WRIT

A. Introduction: Montana Courts' Refusal to Provide Judicial Review.

The Montana judiciary refused to consider two significant constitutional challenges to the state's imposition of beneficial-use taxes on federally owned and operated high-voltage electric transmission facilities,[15] and the Montana Supreme Court denied the third challenge[16] based solely upon its demonstrably false determination of fact.[17] Consequently, this Court is both the last and the *only* forum in which Petitioners can obtain review of the important constitutional claims in these dockets.

---

[15] *Viz.*, discrimination resulting from the new "half at the bottom" approach and from the Department's failure to reflect the amount of power flowing over tax-exempt federal facilities west of Garrison.

[16] *Viz.*, the discrimination occasioned by the State's exempting users of state-owned property from beneficial-use taxation.

[17] *Viz.*, that Rarus Railway Company is a nonprofit corporation.

B. The Montana Beneficial-Use Statute Discriminates Against Those Who Contract with the United States.

By exempting users of state-owned railroad rights-of-way from beneficial-use taxes, Montana favored its contractors at the expense of those who contract with the United States. The requirement that states treat federal contractors no worse than they treat their own is implicit in the Supremacy Clause and explicit in decisions of this Court. For example, in *Phillips* the state legislature had authorized imposition of taxes on lessees of federal lands; in that case a state statute, like Mont. Code Ann. § 15-24-1203 (1989), exempted lessees of similar interests in state-owned property. The local school district imposed taxes on plaintiff based on the value of the entire fee, as opposed to the value of only the leasehold. When the lessee of federal property challenged the tax in state court, the tax was upheld. However, this Court reversed unanimously:

> As we had occasion to state, quite recently, it still remains true, as it has from the time of M'Culloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, that a state

> tax may not discriminate against the Government or those with whom it deals.

361 U.S. at 387.[18]

Phillips was the decisive case in the Fourth Circuit Court of Appeals' consideration of *Manassas*, which involved a situation closely analogous to the present one. In *Manassas*, property taxes had been imposed pursuant to state statute upon IBM for its "use" of federal property.[19] Because Virginia (like

---

[18] A federal district court succinctly stated this proposition as follows:

> Where a taxpayer is singled out and treated differently from all those similarly situated because he transacts business with the United States, as is alleged here, such action discriminates not only against him but also against the United States.

United States v. Dep't of Revenue, 191 F. Supp. 723, 725 (N.D. Ill. 1961).

[19] Because the language of the Virginia exemption of non-federal property is strikingly similar to Montana's own Mont. Code Ann. § 15-24-1203 (1989), the Virginia exemptive language is set forth below:

> Tangible personal property leased, loaned, or otherwise made available to a private party from an agency of federal, state or local government.– . . . This section [imposing beneficial-use taxes] shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to

(continued...)

Montana) had favored its own subdivisions at the expense of federal facilities, the Fourth Circuit Court of Appeals declared the beneficial-use tax on federal facilities invalid. This Court affirmed that determination. 485 U.S. 1017.

Montana has favored those with whom it contracts by exempting them from beneficial-use taxation. At the same time, it has imposed excessive taxes upon the Petitioners, as is demonstrated in the following portion of this petition. The excessive nature of the taxes Montana imposes is an independent basis for issuing a writ of certiorari.

C. The Montana Tax Imposes Greater Taxes on U.S. Contractors than Are Imposed on Other Taxpayers.

This is the first of two constitutional issues that the trial court and the Montana Supreme Court refused to consider.

After the Montana Supreme Court upheld the beneficial-use taxes in *Pacific Power I* and *PGE*, the Department changed the way it computed those taxes in a manner that necessarily imposes greater burdens on those who contract with the United States. The Department's standard approach to valuing property

---

[19](...continued)

> property owned by any transportation district organized under the Transportation District Act of 1964 . . . and leased to provide transportation services.

Va. Code Ann. § 58.1-3502 (*quoted in Manassas*, 830 F.2d at 531).

owned and operated by electric utility companies such as Petitioners is first to derive three indicators of value, *viz.*, the cost indicator, the income indicator, and the stock and debt indicator.[20] The cost indicator is generally represented by the historic, depreciated cost of utility assets used to provide service, the income indicator is derived by capitalizing the utility's income stream, and the stock and debt indicator is derived by determining the market value of the utility's outstanding debt and equity securities. Once these three indicators are known, the Department assigns standardized weights to the indicators; the weights for electric utilities subject to its jurisdiction are 40 percent for the cost indicator, 50 percent for the income indicator, and 10 percent for the stock and debt indicator. For purposes of simplified illustration, assume that each of these indicators has a value of $100 before the impact of federal transmission facilities is considered:

Cost	= $100 x .4= $40
Income	= $100 x .5= $50
Stock and Debt	= $100 x .1= $10
	= $100 Value

---

[20] The Montana Department of Revenue uses the "unitary" approach to valuing public utility property. Under this approach, the entire interstate value of property owned and operated by a public utility company operating in Montana is first ascertained, and then the value attributable to Montana is allocated to Montana. Montana's methodology is similar to methodologies used generally throughout the United States for public utility property. For an excellent theoretical overview of the appraisal of public utility property generally, *see* Amdur, *Property Taxation of Regulated Industries*, 40 Tax Lawyer 339 (1987).

If the Department had treated beneficial-use transmission property as property that is owned by Petitioners (*i.e.*, as it did up until 1986), only the cost indicator would have been increased (this is because both the income and the stock and debt indicators inherently reflect all property that contributes to producing income). Assuming that the new federal transmission property has a cost of $60, that amount would have been added to the cost indicator and weighted at 40 percent. The cost indicator would therefore have increased by $24 to a total of $64, and the overall value would have climbed to $124 solely because of the new federal transmission facilities. Again, this is the approach the Department used until 1986 and the approach the Montana Supreme Court approved in the two earlier beneficial-use cases.

In 1986 and in each year thereafter, however, the Department took *half* of the depreciated cost of the federal transmission facilities and added it "at the bottom," *i.e.*, after the three indicators had already been weighted. Taking half of the assumed $60 cost of new federal transmission facilities ($30) and adding it to the already correlated (or weighted) value ($100) results in a total value of $130. This illustrates the discriminatory impact that the new "half at the bottom" methodology has upon Petitioners: For every dollar of taxes Montana would have collected had the federal transmission property been privately owned, it now collects $1.25 from the Petitioners *solely because those transmission facilities are owned by the United States.*[21] Since 1985 Petitioners have paid approximately $19,116,000 in beneficial-use taxes on the

---

[21] 30 divided by 24 = 125 percent.

federal transmission facilities.[22] This means that the shift in methodology alone has imposed over $3.5 million in excessive beneficial-use taxes on the Petitioners since the 1986 tax year,[23] and unless invalidated this new methodology in the future will inflict up to $800,000 in unwarranted beneficial-use taxes on petitioners annually.

This manifest and substantial discrimination that the Montana Supreme Court specifically refused even to address violates both the Commerce Clause and the Supremacy Clause.

D. The Montana Tax Discriminates Against Interstate Commerce and Those Who Contract with the United States.

This is the second of two constitutional issues that the trial court and the Montana Supreme Court refused to consider.

As noted above, Supremacy Clause principles preclude states from imposing disproportionate taxes upon those who use federal facilities. *See, e.g., United States v. County of Fresno*, 429 U.S. 452 (1977) (basis for tax imposed must not exceed taxpayer's interest in the value of the federal facilities). In addition, Commerce Clause principles are raised when disproportionate taxes are imposed on federal transmission facilities

---

[22] Petitioners now pay annually approximately $4 million in beneficial-use taxes on the federal transmission facilities.

[23] The overpayment percentage under the new approach is 20 percent. 1 divided by 1.25 = .8; 1 minus .8 = .2. $19,116,000 times .2 = $3,823,000.

used to serve out-of-state customers; because the Montana Power Company pays no taxes on the federal 500-kV transmission facilities west of Garrison, Montana,[24] overassessment of the Garrison-Taft federal transmission facilities necessarily discriminates against interstate commerce. The Department overvalued (and today continues to overvalue) the Garrison-Taft facilities by adopting the obviously erroneous assumption that BPA uses exclusively taxable 500-kV facilities to transmit Petitioners' electric power from Garrison to Taft.

Before the Garrison-Taft 500-kV facilities were available for scheduling power in 1986, BPA provided 330 MW of firm transmission demand west of Garrison over tax-exempt 230-kV facilities.[25] The

---

[24] The Montana Power Company, which serves customers predominantly located in the State of Montana, takes all power BPA transmits for it over the Montana Intertie into its system at the Garrison substation.

[25] In *PGE*, the Montana Supreme Court provided a comprehensive description of the 330 MW of firm transmission capacity over 230-kV facilities:

> At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accommodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." *Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power.*

(continued...)

Department commenced imposing beneficial-use taxes on the Petitioners on account of the Garrison-Taft 500-kV facilities in tax year 1986. In order to allocate the reserved Garrison-Taft 500-kV capacity to each of the four non-Montana Petitioners, the Department first calculated a fraction; the numerator of that fraction was each utility's maximum transmission demand under its BPA transmission contract.[26] The collective transmission demands of the four utilities totaled 1,269 MW. The denominator of the fraction was 1,915 MW, which the Department used as the capacity of the Garrison-Taft 500-kV facilities.[27] When the

---

[25](...continued)

> *Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.*

PGE, 773 P.2d at 1191, A86 (emphasis added).

[26] Those percentages are: Pacific Power, 7.31 percent; PGE, 14.10 percent; Puget Sound, 24.33 percent, and Water Power, 20.52 percent. Collectively, the four utilities were charged with 66.27 percent of the total capacity of the Garrison-Taft facilities.

[27] The Department's assumed capacity of the line ignores the bidirectional capability of transmission facilities and the fact that power flow studies presented at trial established that, in fact, power had moved in both directions over the line. In addition, in the course of briefing before the Montana Supreme Court the Department conceded that the actual east-to-west capacity of the Garrison-Taft facilities was 2,000 MW, not 1,915 MW. (At page 57 of its brief, the Department stated that "[I]t is undisputed that the two Garrison to Taft 500 kV lines have a capacity of 2,000 MW.") Had the Department used the correct east-to-west (continued...)

collective transmission demands, 1,269 MW, are divided by the assumed capacity of 1,915 MW, the decimal .6627, or 66.27 percent, is the result. This figure represents the portion of the transmission capacity between Garrison and Taft that the Department allocated to the four non-Montana Petitioners. It is critical to note that the Department utterly failed to recognize the previously existing 330 MW of 230-kV capacity that the Montana Supreme Court referred to in *PGE*. To determine assessable value, the Department then multiplied 66.27 percent times $92,371,397, which it had determined to be the "market value" of the Garrison-Taft facilities.[28] The value of the Garrison-Taft facilities thus assessable to the four Petitioners was thus calculated to be $61,211,124.

The manifest error in the Department's calculations is that the denominator is too small; the necessary result of that error is discriminatory overtaxation. Had the proper denominator been used--one that accounted for the 330 MW of exempt 230-kV transmission facilities the Montana Supreme Court had recognized in *PGE*--the critical percentage would have dropped from 66.27 percent to 56.53 percent.[29] Multiplying this corrected percentage times the total market value of the facilities results in a 1986 value

---

[27](...continued)
number (that is, without adjusting its denominator for bidirectional transmission capability), Petitioners' taxes would have declined by approximately 4 percent.

[28] "Market value" was equal to one-half of the total installed cost less depreciation in accordance with the Department's new "half at the bottom" approach, discussed *supra*.

[29] 1,269 MW divided by 2,245 MW = 56.52561 percent.

assessable to the four Petitioners of $52,213,495, which is almost $9 million lower than the value the Department in fact assessed to the four Petitioners. Because the Department has repeated its error in all tax years following 1986, the total overassessments now exceed $40 million. In sum, the Department's calculations clearly discriminate both against those with whom the United States deals *and* against interstate commerce.

E. Other Important Constitutional Issues Raised in *Pacific Power I* and *PGE* Are Also Before the Court.

All of the basic constitutional issues decided by the Montana Supreme Court in *Pacific Power I* and in *PGE* were presented to the Montana judiciary in this litigation and thus are also now before this Court. Petitioners respectfully urge the Court to grant the petition for certiorari in order to review Montana's unprecedented application of the beneficial-use tax concept.

1. Beneficial-Use Taxation in Absence of Possession, Custody, Control, or Access.

Perhaps the most fundamental issue raised in the earlier litigation is whether a state may legitimately impose a beneficial-use tax on purchasers of a service provided by the federal government where the federal government prohibits the party from having any possession, custody, control, or physical access to the facilities subject to the tax. Under their arrangements with BPA, Petitioners turn electric power over to BPA at Townsend, Montana (*see* map, *supra* at 2), and take an equivalent amount of

power, less line losses, from BPA at their various points of delivery. BPA alone schedules, operates, maintains, repairs, and effects replacements to its multistate transmission system which provides this service. Petitioners have access to none of these facilities; therefore, under *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and cases consequent thereto, the beneficial-use tax may not be imposed.[30] Because Petitioners lack possession, control, custody, and access to the federal transmission facilities, beneficial-use property taxes may not be imposed upon them.

2. Discrimination Against Interstate Commerce by Restricting Taxes to 500-kV and Higher Facilities.

The record contains extensive and unrefuted evidence to the effect that 500-kV and higher transmission facilities--the highest voltage alternating current transmission lines in the entire Pacific

---

[30] *See, e.g., Mayo v. United States*, 319 U.S. 441, 448 (1943) (federal instrumentalities actively employed by U.S. government are exempt from state taxation); *United States v. County of Allegheny*, 322 U.S. 174, 177 (1944) (activities of federal government are not subject to state taxation in absence of congressional consent); *cf. United States v. City of Detroit*, 355 U.S. 466 (1958) (tax may be imposed on one who possesses and uses federal property); *United States v. Township of Muskegon*, 355 U.S. 484 (1958) (tax may be imposed on permittee in actual possession of federal government plant); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489 (1958) (lawful possession of federal property may be basis for imposing tax on one who benefits from such possession); Keesling, *Property Taxation of Leases and Other Limited Interests*, 47 Calif. L. Rev. 470, 487-92 (1959) (property tax can be imposed only if the taxpayer has both possession and use of property subject to tax).

Northwest--serve as arteries of interstate commerce in electric power. The higher the voltage, the greater the impact upon interstate commerce. Montana has singled out these arteries of interstate commerce for taxation while exempting lower-voltage lines that tend to serve more local interests. Montana's intentional imposition of disproportionate burdens on interstate commerce violates the Commerce Clause. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

3. Preemption of Montana's Beneficial-Use Tax on Federal 500-kV Transmission Facilities.

Montana's beneficial-use tax is inconsistent with and thus preempted by two federal statutes. First, Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839e(m) (1982), reprinted at A7, authorizes BPA to make "impact aid" payments to local governmental units affected by the construction and continued operation of new high-voltage federal transmission facilities. The logic behind the impact-aid provision was to eliminate any possible basis for a claim that new federal transmission facilities in Montana (such as those upon which Montana has imposed taxes in this controversy) would not be paying their way. The respondent taxing districts in this litigation have already received hundreds of thousands of dollars of BPA funds on account of the 500-kV federal transmission facilities; now they seek to impose property taxes upon those facilities as well. Congress obviously did not intend Montana to have both sources of revenue, and therefore Montana's beneficial-use tax on those facilities is preempted by the impact-aid provision.

The second federal statute, Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), reprinted at A4, also preempts Montana's imposition of beneficial-use taxes. That statute prohibits taxation that discriminates against interstate commerce in electricity, and defines discriminatory taxation as resulting, "either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." In the only decision from this Court applying the Anti-Discrimination Act, *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), the unanimous Court invalidated a New Mexico tax on the privilege of generating electricity within the state because out-of-state electricity users bore a greater burden than in-state users. By the same token, because Montana's tax on 500-kV facilities itself necessarily discriminates against electricity sold outside of Montana, the tax violates and thus is preempted by the Anti-Discrimination Act.

4. Other Claims.

Petitioners also challenged Montana's imposition of beneficial-use taxes on fourteenth amendment grounds and on implied preemption grounds. The evidence in the record supports these challenges as well. Because these challenges are quite similar to challenges discussed above, they are not discussed in detail in this petition.

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued and that this Court declare Montana's imposition of beneficial-use taxes on Petitioners unconstitutional under the Commerce Clause, the Supremacy Clause, and the fourteenth amendment to the U.S. Constitution.

Respectfully submitted,

Thomas H. Nelson
James C. Paine
STOEL RIVES BOLEY
JONES & GREY
900 SW Fifth Ave., Suite 2300
Portland, OR 97204
Telephone: (503) 224-3380

Donald R. Murray, Jr.
MURPHY, ROBINSON,
HECKATHORN & PHILLIPS
431 First Avenue, West
PO Box 769
Kalispell, MT 59903
Telephone: (406) 752-6644

90-1738

No. _____

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Thomas H. Nelson*
James C. Paine
STOEL RIVES BOLEY
JONES & GREY
900 SW Fifth Ave., Suite 2300
Portland, OR 97204
Telephone: (503) 294-9281

Donald R. Murray, Jr.
MURPHY, ROBINSON,
HECKATHORN & PHILLIPS
431 First Avenue, West
Kalispell, MT 59903
Telephone: (406) 752-6644

Counsel of Record

APPENDIX

TABLE OF CONTENTS

Page

Constitutional and Statutory Provisions A1

Article VI, clause 2, U.S. Constitution ("Supremacy Clause") A1

Article I, section 8, clause 3, U.S. Constitution ("Commerce Clause") A2

Fourteenth Amendment, U.S. Constitution A3

Anti-Discrimination Act, 15 U.S.C. § 391 (1982) A4

Bonneville Project Act, 16 U.S.C. § 832 (1982) A5

Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839 (1982) A7

28 U.S.C. § 1341 (1982) A10

Mont. Code Ann. § 15-24-1203 (1989) A11

Pacific Power & Light Company v. Montana Department of Revenue, ___ Mont. ___, 804 P.2d 397 (1991) A11

Appellants' Petition for Rehearing in *Pacific Power & Light Company v. Montana Department of Revenue*, Mont. Sup. Ct. Docket No. SC 90-212 (Jan. 18, 1991) A21

Order [Denying Petition for Rehearing] in *Pacific Power & Light Company v. Montana Department of Revenue*, Mont. Sup. Ct. Docket No. 90-212 (Feb. 14, 1991) A47

Order in *Pacific Power & Light Company v. The Department of Revenue of the State of Montana*, (Lewis & Clark County Dist. Ct. Jan. 25, 1990) A48

Pacific Power & Light Company v. Montana Department of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989) A58

Portland General Electric Company v. Montana Department of Revenue, 237 Mont. 324, 773 P.2d 1189 (1989) A83

Page

Pacific Power & Light Company v. Department of Revenue, Nos. SPT-1988-4; SPT-1988-5; SPT-1988-6; SPT-1988-8; SPT-1988-9; SPT-1988-11; SPT-1989-4 (Mont. State Tax Appeal Bd. Aug. 30, 1990). A92

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution, article I, section 8, clause 3, provides:

> [The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2121(a) of the Tax Reform Act of 1978, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Section 4 of the Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838b (1982), provides:

> The Secretary of Energy, acting by and through the Administrator [of the Bonneville Power Administration] shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as he determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units;
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities, or
>
> (d) maintain the electrical stability and electrical reliability of the Federal system: *Provided, however,* That the Administrator shall not construct any transmission facilities outside the Pacific Northwest, excepting customer service facilities within any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative which has (i) no generating facilities, and (ii) a distribution system from which it serves both within and without said region, nor shall he commence construction of any of any major transmission facility within the Pacific Northwest, unless the expenditure

of the funds for the initiation of such construction is specifically approved by Act of Congress.

Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982), provides:

> (1) Beginning the first fiscal year after the plan and program required by section 839b(d) and (h) of this title are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act --
>
> (A) which are located within the jurisdictional boundaries of such governments,
>
> (B) which are determined by the Administrator to have a substantial impact on such governments, and
>
> (C) where the construction of such facilities, or any modification thereof, is completed after December 5, 1980, and, in the case of a modification of an existing facility, such modification substantially increased the capacity of such existing transmission facility.
>
> (2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective on its approval, after considering its effect on rates established pursuant to this section, by the Federal

Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act. The provisions of section 13 of such Act, and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency and subsequently made available to the Administrator for such facilities.

Title 28 U.S.C. § 1341 (1982), provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Montana's "beneficial-use" tax statute, Mont. Code Ann. § 15-24-1203 (1989), provides (the penultimate sentence was added by the 1983 Legislature, and the last sentence was added by the 1987 Legislature):

> After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way or track is used exclusively for rail transportation.

No. 90-212
IN THE SUPREME COURT
OF THE STATE OF MONTANA
1990

PACIFIC POWER & LIGHT COMPANY,
PORTLAND GENERAL ELECTRIC COMPANY,
WASHINGTON WATER POWER COMPANY
PUGET SOUND POWER & LIGHT COMPANY
and THE MONTANA POWER COMPANY,

Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF REVENUE, et al.,

Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Donald R. Murray, Jr.; Murphy, Robinson, Heckathorn & Phillips, P.C., Kalispell, Montana

Thomas H. Nelson; Stoel, Rives, Boley, Jones & Grey, Portland, Oregon

For Respondents:

David W. Woodgerd, Chief Legal Counsel, Department of Revenue, Helena, Montana

Paul Van Tricht, Tax Counsel, Department of Revenue, Helena, Montana

Larry G. Schuster, Department of Revenue, Helena, Montana

Submitted: December 6, 1990
Decided: January 10, 1991

Filed: JAN 14 1991

Clerk

Justice Diane G. Barz delivered the Opinion of the Court.

Appellants appeal an order of the First Judicial District Court, Lewis and Clark County, in a consolidated proceeding for declaratory and injunctive relief, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes against the appellants pursuant to § 15-24-1203, MCA. Appellants are challenging the beneficial use taxes for tax years 1985, 1986, and 1987, upon certain federally-owned 500 kilovolt (KV) transmission lines located between Townsend, Montana, and the Idaho border. The District Court granted DOR's motion for partial summary judgment on res judicata grounds and held that this Court's earlier decisions in *Pacific Power and Light Company v. Montana Department of Revenue* (1989), 237 Mont. 77, 773 P.2d 1176, and *Portland General Electric Company v. Montana Department of Revenue* (1989), 237 Mont. 324, 773 P.2d 1189, were dispositive of some of the issues before the District Court. On January 25, 1990, following trial on the remaining issues, the District Court entered an order denying the appellants' claims. The District Court held that the Colstrip Owners had not sustained the burden of proving that the assessment of the beneficial use taxes had violated any statutory or constitutional rights. We affirm.

The factual background leading up to this case has been previously set forth in *Pacific Power and Light* and *Portland General Electric* therefore, we will discuss only the facts necessary to dispose of the relevant issues.

The appellants (Colstrip Owners) are five investor-owned utilities which own undivided interests in coal-fired generating plants at Colstrip, Montana. The Colstrip Owners (Pacific Power & Light Company (PPL), Puget Sound Power & Light Company (Puget), Washington Water Power Company (WWP), Portland General Electric Company (PGE), and Montana Power

Company (MPC)), have been assessed beneficial use taxes under § 15-4-1203, MCA, for tax years 1985, 1986, and 1987 with regard to the use of the 500 KV federally-owned transmission line between Townsend and Garrison, Montana, and for tax years 1986 and 1987 with regard to the 500 KV federally-owned transmission lines between Hot Springs, Montana and the Idaho border and between Garrison and the Idaho border.

The Colstrip Owners constructed Colstrip Units 3 and 4 in 1983 and 1985 respectively. Units 3 and 4 each generate 700 megawatts of electricity for transmission west. The energy from the Colstrip units is transmitted over the Colstrip Owners' two 500 KV transmission lines to its substation at Broadview, Montana, and from the Broadview substation over the Colstrip Owners' 500 KV lines to a point near Townsend, Montana. At Townsend, the 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV transmission lines. BPA constructed a substation on the Hot Springs to Idaho border 500 KV line (referred to as the "Taft substation") and a Garrison to Taft 500 KV line, to accommodate the increased energy from Colstrip Units 3 and 4. Prior to the completion of the Garrison to Taft 500 KV line, there was no interconnecting 500 KV line west from the Garrison substation. The Garrison to Taft 500 KV line became operational in October, 1985, and was declared available for service in January, 1986. Colstrip power first flowed from the Garrison substation across the Garrison to Taft line during October, 1985. At the Garrison substation, two 230 KV lines run north and interconnect with the Hot Springs substation. These 230 KV lines were known as the "bottleneck" and were the only means of transmitting power west from Garrison prior to BPA's construction of the Garrison to Taft 500 KV line.

The transmission of Colstrip energy from the Garrison substation west, is governed by a series of

agreements referred to as the "Garrison West" agreements, entered into by each of the Colstrip Owners with BPA. The transmission demands of each Colstrip Owner as set forth in their respective Garrison-West agreements served as the basis for DOR's allocation of the beneficial use tax. The total cost of the BPA transmission facilities were allocated to the Colstrip Owners as a ratio of each Colstrip Owners' transmission demand over the total capacity of the lines. This allocated cost was then multiplied by 50% and added to each Owner's respective allocated Montana value. All the Colstrip Owners were assessed the beneficial use tax on this basis for use of the Townsend to Garrison segment in tax years 1985, 1986, and 1987. Four of the Colstrip Owners (MPC was not assessed beneficial use taxes for the facilities west of the Garrison substation) were assessed the tax on this basis for the use of the Garrison to Taft substation segment of the transmission line system for tax years 1986 and 1987, and for the use of the Taft to Idaho border segment for tax years 1986 and 1987. PPL was also assessed the tax on this basis for its use of the Hot Springs to Taft transmission line system for tax years 1986 and 1987.

Appellants raise six issues on appeal:

1. Whether the District Court erred by assuming jurisdiction to decide the legality of the tax assessments prior to a final determination by the State Tax Appeals Board (STAB).

2. Whether the assessment of beneficial use taxes pursuant to § 15-24-1203, MCA, violates the Supremacy Clause of the United States Constitution by discriminating against the United States or the Colstrip Owners.

3. Whether the Colstrip Owners' previous constitutional claims are barred by the doctrine of collateral estoppel.

4. Whether the taxes assessed for tax year 1986 on the Garrison-Taft 500 KV line were unlawful or illegal.

5. Whether DOR's methodology erroneously assumes that all power transmitted west of Garrison passes over the 500 KV federal lines and thereby discriminates against interstate commerce by imposing disproportionate taxes.

6. Whether DOR's new assessment methodology (50% weighting) is unconstitutional.

The Colstrip Owners contend that the lower court could not properly evaluate the constitutional questions before it, until after STAB had made a final determination concerning the methodology and amount of the assessments. It is the Colstrip Owners' position that the taxes imposed are excessive and discriminatory and, therefore, since questions of discrimination are often questions of degree, the underlying considerations necessary to properly determine the constitutional issues were not yet decided. We disagree.

This Court has previously held that questions of "constitutional and statutory correctness" are properly decided by the courts. *Larson v. State* (1975), 166 Mont. 449, 457, 534 P.2d 854, 858. The question of whether the *tax itself* is unconstitutional bears upon the statutory language of the tax. On the other hand, the question of whether the tax is unconstitutional *as applied* pertains to the circumstances under which the tax is imposed. The interpretation of either the statutory language or the circumstances surrounding imposition of a tax is not necessarily associated with the *amount* of that tax. If we determine that a tax is unconstitutional, either on its face or as applied, such determination can certainly be made independent and apart from any analysis of whether the

tax is excessive. Therefore the constitutional issues presented by this appeal do not hinge upon the determinations STAB makes concerning the methodology and amount of the assessments.

The second issue raised by appellants is whether the 1987 amendment to § 15-24-1203, MCA, violates the Supremacy Clause of the United States Constitution, Article VI, § 2, as construed by the U.S. Supreme Court in *United States v. City of Manassas* (4th Cir. 1987), 830 F.2d 530, affirmed (1988), 485 U.S. 1017, 108 S.Ct. 1568, 99 L.Ed.2d 884. The Colstrip Owners argue that because the 1987 amendment results in exempting from beneficial use taxes State-owned property used for railroad transportation, it thereby violates the rule in *City of Manassas*.

The Fourth Circuit stated in *City of Manassas* that it is unconstitutional for States to tax users of federal property when similarly situated users of State property are exempt from taxation. *City of Manassas*, 830 F.2d at 534. The test to determine whether a State tax is unconstitutionally discriminatory was first set out by the United States Supreme Court in *Phillips Chemical Co. v. Dumas School District* (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. The Court held that where those dealing with federal property are subject to greater use taxation than those dealing with State property, the statutory distinction "must be justified by significant differences between the two classes." *Phillips Chemical Co.*, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. It is true that the 1987 amendment to § 15-24-1203, MCA, exempts users of State-owned rail lines from beneficial use taxes. However, after a thorough examination of the legislative history supporting this amendment, it becomes evident that there are "significant differences" between the railroads and the utilities (Colstrip Owners).

Chapter 591, 1987 Laws of Montana, was intended to exempt from beneficial use taxation two proposed tourist railroads which were to be run by non-profit corporations. See Senate Comm. on Business and Industry, Minutes on S.B. 272, 50th Leg., 4-5 (Feb. 18, 1987).

The State-owned railroad line in question had been acquired by the State as "abandoned" property under § 60-11-111, MCA, and consisted of a combined distance of thirty miles of track. The two non-profit railroads were designed to promote tourism in the form of an added attraction to parts of historic Montana.

The railroads' situation is much different than that of the Colstrip Owners. The Colstrip Owners' primary business purpose is to make a profit. The use of the federally-owned transmission lines provide the Colstrip Owners the potential to significantly increase revenues. The United States Supreme Court in *City of Detroit v. Murray Corp.* (1958), 355 U.S. 489, 78 S.Ct. 458, 2 L.Ed.2d 441, held it proper for a State to tax government property, used by a private party, in the course of the party's own business. This is precisely what is being done in this case. The Colstrip Owners are being taxed for their use of federal property. This Court has already determined that "beneficial use" does not necessarily require "physical possession, exclusive use or control of the facilities." See *Portland General Electric Co.*, at 329, 773 P.2d at 1192. Therefore, we hold that § 15-24-1203, MCA, and the 1987 amendment does not discriminate against the United States or the Colstrip Owners.

The third issue is whether the Colstrip Owners' previous constitutional claims raised in *Pacific Power and Light* 237 Mont. 77, 773 P.2d 1176, and *Portland General Electric*, 237 Mont. 324, 773 P.2d 1189, are barred by the doctrine of collateral estoppel. As we recently stated in *Smith v. Schweigert* (1990), 241 Mont. 54, 785 P.2d 195,

collateral estoppel is a form of res judicata, and whereas res judicata bars the same parties from relitigating the same cause of action, collateral estoppel bars the same parties from relitigating identical issues that have already been decided in a different cause of action. There are three elements that must be satisfied in order for collateral estoppel to apply. First, the issue must be identical to an issue that has been decided in a prior adjudication. Second, a final judgment on the merits must have been made in the prior adjudication. Third, the party against whom the plea is made must have been a party, or have privity to the party, in the prior adjudication. *Smith* at 58, 785 P.2d at 197. In applying each element in turn to the facts of this case it becomes clear that collateral estoppel should be applied. The Colstrip Owners do not dispute the fact that the previous constitutional claims raised in *Pacific Power and Light*, 237 Mont. 77, 773 P.2d 1176, for the 1984 tax year, and *Portland General Electric*, 237 Mont. 324, 773 P.2d 1189, for the 1985 tax year, are again being asserted in this litigation. The appellants now assert the identical claims for the 1985, 1986 and 1987 tax years. The fact that different tax years are being challenged makes no difference. The constitutional challenges remain the same, and it is the substance of these challenges that have failed. The year in which they were brought has no bearing upon their lack of success. Allowing the Colstrip Owners to raise the *same* challenges to the *same* tax each subsequent tax year serves no purpose. If such were the case, each new year would provide a clean slate for any and all previous claims to be readjudicated. The challenges are identical to the issues raised in the previous cases before this Court and thus satisfy the first element.

Likewise, this Court issued a final judgment with respect to those claims in *Pacific Power and Light*, 237 Mont. 77, 773 P.2d 1176, and *Portland General Electric*, 237 Mont. 324, 773 P.2d 1189, thereby satisfying the second element. That judgment was made after oral argument and at a time

much closer to our thorough consideration of the issues. Reconsideration of those issues as the Colstrip Owners would have us do, at a much later time such as now, would not be correct.

The third element is also satisfied. In both the prior cases and the case at bar, DOR is the party against whom these issues were raised. In fact, all parties in this lawsuit have been parties in the prior adjudication. Consequently, the Colstrip Owners' previous constitutional claims have been adjudicated and are barred by collateral estoppel from being raised a second time.

The fourth issue is whether the taxes assessed for tax year 1986 on the Garrison to Taft 500 KV line were unlawful or illegal. This issue will be discussed concurrently with the fifth issue, whether DOR's methodology erroneously assumes that all power transmitted west of Garrison passes over the 500 KV federal lines. Section 15-1-406, MCA, was enacted by the legislature in 1981 to provide an aggrieved taxpayer with an alternative means of challenging the imposition of a tax. Likewise, § 15-2-307, MCA, was enacted to provide an aggrieved taxpayer an alternative means of challenging the method or procedure of assessment. Under both sections a taxpayer may proceed directly to district court in the form of a declaratory judgment action. However, if a challenge is initially brought under Title 15, Chapter 2 of the MCA, pursuant to § 15-1-402, MCA, a taxpayer is required to exhaust the available administrative remedies before proceeding to the courts. See § 15-1-402 (2), MCA. The Colstrip Owners chose to bring issues four and five before STAB in accordance with Title 15, Chapter 8, MCA, and Title 15, Chapter 2, MCA, respectively. Had the issues been raised directly to district court in the form of a declaratory judgment action, they would properly be before this Court. But because these issues were initially brought before STAB, they must be first dealt with at that level.

Any decision STAB makes may be appealed through district court to this Court.

The final issue deals with a revision of assessment methodology. As the District Court stated in its denial of the Colstrip Owners' Motion for Leave to File First Amended Complaints, under § 15-8-601(3)(c), MCA, challenges to revisions in assessments must be made by appeal to STAB. The District Court correctly refused to hear this issue and, therefore, we will not hear it either. Once the issue has been brought before STAB a proper judicial review will then be available to the appellants.

The decision of the District Court is affirmed.

s/ Diane G. Barz
Justice

We Concur:

TURNAGE, C.J., and HARRISON, SHEEHY, HUNT, McDONOUGH and WEBER, JJ., concur.

IN THE SUPREME COURT
OF THE STATE OF MONTANA
NO. 90-212

PACIFIC POWER & LIGHT COMPANY, et al.,	)
Plaintiffs-Appellants,	)
v.	)
MONTANA DEPARTMENT OF REVENUE, et al.,	)
Defendants-Respondents.	)

APPELLANTS' PETITION FOR REHEARING

Appellants[1] file this Petition for Rehearing of the decision in Case No. 90-212 issued on January 10, 1991 ("Decision") pursuant to Rule 34 of Montana's Rules of Appellate Procedure. That rule provides in relevant part:

> In all other cases a petition for rehearing may be filed within 10 days after the decision of the Supreme Court has been rendered . . . . A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the

---

1 Plaintiffs-Appellants are Pacific Power & Light Company ("Pacific"), Portland General Electric Company ("PGE"), The Washington Water Power Company ("Water Power"), Puget Sound Power & Light Company ("Puget Sound"), and the Montana Power Company ("Montana Power").

> case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed.

Two portions of the Decision require rehearing. First, the Court made an erroneous conclusion of a critical fact, *viz.*, that the railroad companies that are exempted, pursuant to the 1987 amendment to 15-24-1203, MCA, from beneficial-use taxes notwithstanding their use of state-owned property, are nonprofit corporations. In fact, Rarus Railway Company, one of the two companies that has enjoyed and today enjoys the statutory exemption, is a for-profit entity. Second, this Court erroneously concluded that the constitutionality of both the Department's refusal to factor in the impact of tax-exempt 230-kV facilities west of Garrison and the "half at the bottom" approach--issues five and six in the Decision-- were initially presented to STAB and not to the District Court. Those issues were before the District Court long before the spring of 1988, when the Department issued its revisions that led to the commencement of the STAB process. Unfortunately, this Court's refusal to address those two constitutional questions opens the possibility of further significant delays in order to resolve the important beneficial-use tax issues in federal district court.

The Decision Relies upon an Erroneous Critical Fact

In the two earlier beneficial-use cases decided by this Court Appellants attempted to secure a decision regarding the constitutionality of the 1987 amendment 15-24-1203, MCA, under the doctrine of *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988) ("*Manassas*"). *Manassas* held that it is unconstitutional for states to tax users of federal property when similarly situated users of state property are exempt from taxation, and is based on the Supreme Court's rationale in

Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 2d 384 (1960) ("*Phillips*"), which held that any statutory distinction "must be justified by significant differences between the two classes." *Id.* at 383, 80 S.Ct. at 479, 4 L.Ed. 2d at 389.

In accord with *Phillips*, the Decision sought a "significant difference" to justify exemption of users of state-owned railroad property from the beneficial-use tax. It concluded that the "significant difference" was that the users of state-owned property, unlike Appellants, are nonprofit corporations. The Decision states: "The railroads' situation is much different than that of the Colstrip Owners. *The Colstrip Owners' primary business purpose is to make a profit.*" Decision at 7 (emphasis added). However, because one of the exempted railroads is in fact a for-profit entity, there is *no* "significant difference" at all.

The Department has conceded that two companies enjoy the exemption granted by the 1987 amendment to 15-24-1203, MCA: Rarus Railway Company and CMR Railroad. Department Brief at 35.[2] Appellants believe that this Court fell into error because it looked solely to the early legislative history behind the 1987 amendment to the beneficial-use tax statute, and from that legislative history

---

[2] The Department stated:

> Ms. Whittinghill testified at trial that the Department had assessed beneficial use taxes against two short line railroads. (Pl. Ex. 241, Pgs. 1074-1076). Those entities were RARUS and CMR. Each railroad was assessed for beneficial use taxation until the Legislature amended 15-24-1203, MCA, during 1987.

Department Brief at 35 (footnote omitted).

erroneously concluded that Rarus and CMR railroads are both nonprofit. They are not. Before conclusively establishing that point, however, it is interesting to trace how the Court was led into such an error.

The Department's own dubious tactics are largely to blame for this confusion. Instead of developing the "nonprofit" rationale as a part of its affirmative case during trial, it was not until the briefing stage before this Court that the Department spun this theory by referring to the legislative history and the prior CMR STAB decision. *See* Respondent's Brief at 31 & 35. Of course, as Appellants pointed out in their Reply Brief, there is absolutely nothing in the text of the 1987 amendment that restricts the benefits of the 1987 amendment to nonprofit entities. Appellants' Reply Brief at 18. Indeed, a very careful reading of the Department's brief discloses that the Department did not expressly claim that nonprofit status is a prerequisite to exemption; on page 31 of its brief the Department did note that the exempted railroads were operated "for nonprofit or for tourism purposes."[3] Rather than pointing out the significance of the disjunctive "or," however, the Department then went on to stress the difference between the Colstrip Owners and the nonprofit CMR Railroad by asserting that "The Colstrip owners' dominant business motive is profit," noting in its accompanying footnote that "The Colstrip owners have a

---

[3] If Appellants are allowed to present rebuttal to the Department's belated assertions of fact, they will demonstrate that the Rarus Railway Company operates 26 miles of track between Anaconda and Butte, transporting slag and copper concentrate from Anaconda and beer and coal to Anaconda. These activities are neither nonprofit nor tourism related.

fiduciary duty to maximize profits for their shareholders." Respondent Brief at 31 & n.36. Focusing solely on the CMR Railroad at this point was at best deceptive to the point of being disingenuous, for the clear implication was that nonprofit status makes a difference. To avoid misleading the Court the Department should have stated that, just like the Colstrip Owners, the Rarus Railway Company owes a duty to *its* shareholders to maximize profit; leaving the issue as it did, however, the Department led this Court into the error that nonprofit status is a prerequisite to exemption under the 1987 amendment.

The records of Montana's Secretary of State verify that Rarus Railway Company is a for-profit Montana corporation. Certified Articles of Incorporation are attached hereto as Exhibit A which Appellants respectfully request this Court to notice pursuant to Rule 201 of the Montana Rules of Evidence.[4] The legal consequence is straightforward: There is simply no "significant difference" between the Appellants and those who enjoy the benefits from use of state-owned property pursuant to the 1987 exemption. This being the case, the Court should invalidate the beneficial-use taxes imposed upon Appellants.

---

[4] Secretary of State Jim Waltermire's "Certificate of Incorporation" dated March 4, 1985, recites that Articles of Incorporation of Rarus Railway Company were duly executed pursuant to the provisions of 35-1-203, MCA. That section is in the chapter governing for-profit corporations. Nonprofit corporations are covered by 35-2-101 *et seq.*

The Decision Errs by Assuming Issues Five and Six Were First Presented to STAB and Not to the District Court

The Decision states that issues five and six--discrimination against interstate commerce by the Department's failure to consider the effect of transmission over exempt 230-kV facilities, and constitutionality of "fifty percent at the bottom" approach, respectively--were initially brought before STAB and not the District Court. This is wrong. Both issues were in fact properly presented to the District Court long before the STAB proceedings were instituted, and thus this Court should provide a ruling on the merits of both claims.

The Decision characterizes issue five as follows:

> Whether DOR's methodology erroneously assumes that all power transmitted west of Garrison passes over the 500 KV federal lines and thereby discriminates against interstate commerce by imposing disproportionate taxes.

Decision at 5. This is an issue that has been part of the Garrison-West challenges since the very beginning; in fact, in *Portland General Electric Co. v. Department of Revenue*, 773 P.2d 1189 (Mont. 1989) ("*PGE*"), this Court addressed an issue quite similar to this discrimination claim.[5]

---

[5] In *PGE*, this Court overcame the claim of discrimination by noting:

> *To eliminate any influence of 230 KV lines in the assessment*, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines. . . .

(continued...)

Long before the spring of 1988 (when the STAB proceedings were first instituted), Appellants claimed *in all three dockets consolidated for trial and on appeal* that the imposition of the beneficial-use taxes discriminated against interstate commerce. Complaint in ADV-86-069, ¶ 26 (Jan. 1986); Complaint in ADV-87-081, ¶ 33 (Jan. 1987); Complaint in ADV-88-032, ¶ 33 (Jan. 1988). The Department's spring 1988 revisions that led to the STAB process had nothing to do with the allocation of Garrison-West capacity between taxable and nontaxable facilities, and thus the unconstitutional discrimination issue remained where it was initially--squarely in front of Judge Loble. And, as pointed out in Appellants' Reply Brief at 30, Appellants raised this issue consistently in the trial court, including in the undersigned's *opening statement*, which occurred *prior to* the STAB hearings! As a result, it was the District Court, and not STAB, that initially had to decide the claim of unconstitutional discrimination. Therefore, the Decision is in error regarding issue five.

The Decision characterizes issue six as "Whether the DOR's new assessment methodology (50 percent weighting) is unconstitutional." Decision at 5. As Mr. Van Tricht stated explicitly during oral argument, the Department first adopted the "half at the bottom" approach in 1986--long before the spring 1988 revisions that led to the STAB process. Again, the complaints in the 1986, 1987, and 1988 cases were all filed before the revisions and consequent STAB process. Judge Loble knew that this was a live issue; indeed, as he admitted in his opinion, he allowed to present "a great deal of additional evidence, *especially with regard to the fifty percent revision . . . .*" District Court Order

---

[5](...continued)

PGE, 773 P.2d at 1193 (emphasis added).

at 10. Judge Loble denied the claim not because it should have been presented to STAB but, rather, because of "lack of evidence." District Court Order at 10. Consequently, not only was the "half at the bottom" issue properly presented to Judge Loble, he appropriately assumed jurisdiction over it. It is simply wrong to assert that the issue was initially presented to STAB; in fact, it was initially presented to the District Court. Consequently, this Court should face the merits of the issue directly.

There is an even more compelling reason why the rationale of the Decision is wrong: The STAB did not entertain any constitutional questions, including issue five or issue six. Copies of the August 30, 1990, STAB decision were filed with this Court by both the Department and by Appellants. *See* Appendix A to Appellants' Reply Brief. The sole issue addressed by STAB was whether the 1986 taxes on the Garrison-Taft facilities were validly imposed--which was the major revision that initially led to invocation of the STAB process. STAB obviously declined to consider the constitutional questions contained in issues five and six during its April 1990 hearings because Judge Loble had already assumed jurisdiction over and decided those constitutional issues in his January 25, 1990 Order. As a consequence, this Court should address those constitutional issues.

Because STAB did not--indeed, could not--entertain issues five and six, it appears that the only state forum available to Appellants to obtain a ruling on the merits is this Court. As already indicated, the factual record regarding those issues is complete--both the Department and Appellants have provided evidence and analysis on each claim. If the Decision is not reheard and these two issues reconsidered, it will mean that the Montana judicial system will have deprived Appellants of an opportunity for final judicial resolution of these two significant constitutional questions. Such a result would not,

however, preclude all relief; rather, it would merely open another door that would require still further delay. Assuming possible subsequent judicial review by the U. S. Supreme Court were denied, Appellants contend that they would then be able to raise at least these two constitutional issues in federal district court. This is because federal law allows federal district courts to assume jurisdiction over state tax disputes when the state remedy is not "plain, speedy and efficient." Specifically, the Anti-Injunction Act, 28 U.S.C. § 1341 (1982), provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Decision's conclusion--that the Court will not consider the constitutional dimensions of issues five and six even though the issues were initially presented to the District Court long before the Department's revisions that led to the STAB process and even though the STAB could not and did not consider those issues--clearly would deprive Appellants of a plain, speedy, and efficient legal remedy in Montana courts.

Appellants have no desire to delay the ultimate resolution of these matters any further, for Appellants are aware of and sympathetic to the difficulties this litigation is causing for local taxing districts. Throughout this litigation (and often over Department objections) Appellants have sought a fast, comprehensive resolution of these important constitutional questions. However, Appellants are unwilling to surrender important constitutional questions without so much as an explanation regarding why their sincerely advanced concerns lack merit. While Judge Loble entertained those claims, he provided no rationale for his result. Unfortunately, the

Decision likewise provides no rationale. Appellants urge the Court to rehear and reconsider its refusal to address issues five and six.

For the foregoing reasons, Appellants respectfully request that this Court rehear the Decision for the purpose of correcting two important factual errors therein.

Respectfully submitted,

s/ Thomas H. Nelson
Thomas H. Nelson
James C. Paine
Donald R. Murray
Of Attorneys for Appellants

January 18, 1991

SECRETARY OF STATE
STATE OF MONTANA

Mike Cooney
Secretary of State

THE GREAT SEAL
of the
State of
Montana

Montana State
Capitol
Helena, MT 59620

CERTIFICATION
of photocopies for:

RARUS RAILWAY COMPANY

I hereby certify that the annexed is a true and complete copy of the ten page document(s) on file in this office.

DATED: January 15, 1991

s/ Mike Cooney
SECRETARY OF STATE

By s/ Florence Aimegast
Deputy

SECRETARY OF STATE
STATE OF MONTANA

CERTIFICATE OF INCORPORATION

I, JIM WALTERMIRE, Secretary of State of the State of Montana, do hereby certify that the Articles of Incorporation for the incorporation of RARUS RAILWAY COMPANY, a Montana corporation, duly executed pursuant to the provisions of Section 35-1-203, Montana Code Annotated, have been received in my office and conform to law.

NOW, THEREFORE, I, JIM WALTERMIRE, as such Secretary of State, by virtue of the authority vested in me by law, hereby issue this Certificate of Incorporation to RARUS RAILWAY COMPANY, a Montana corporation, and attach hereto a copy of the Articles of Incorporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this March 4, A.D. 1985.

s/ Jim Waltermire

(GREAT SEAL)

JIM WALTERMIRE
Secretary of State

TO: THE HONORABLE JIM WALTERMIRE
Secretary of State
Montana State Capitol
Helena, MT 59620

171911
State of Montana
FILED
Sep 2 1986
Jim Waltermire
Secretary of State

Filing Fee: $5.00

STATE OF MONTANA
STATEMENT OF CHANGE OF REGISTERED AGENT OR REGISTERED OFFICE, OR BOTH, OF CORPORATION

For the purpose of having and continuously maintaining a registered agent at a registered office with the State of Montana, according to 35-1-305, 35-1-1012, 35-2-202, or 35-2-811, MCA, the undersigned submits the following statements of fact to the Secretary of State.

1. The exact name of the corporation is: RARUS RAILWAY COMPANY

2. The name of the present registered agent is: J. W. Greene

3. The name of the new registered agent is: D. M. Bisch

4. The address of the present registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711

5. The address of the new registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711
(Include street name and number or physical location in addition to box number with the city and zip)

6. The undersigned further states that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

7. Such change was authorized by resolution duly adopted by its board of directors.

8. By my signature below, I, an officer of the above corporation, do state that I signed this statement on behalf of the corporation and that the statements therein contained are true, under penalty of false swearing.

Rarus Railway Company
Exact name of corporation

s/ N. A. Rustad	Secretary-Controller	8/18/86
Signature of Officer	Title of Officer	Date

ARTICLES OF INCORPORATION
FOR
RARUS RAILWAY COMPANY

The undersigned incorporators, for the purpose of forming a corporation under the Montana Business Corporation Act and the laws of Montana, hereby adopt the following articles of incorporation:

I.

NAME: The name of the corporation is RARUS RAILWAY COMPANY.

II.

DURATION: The corporation is to exist perpetually.

III.

PURPOSES: The purposes for which the corporation is organized are to own, operate and maintain railroads and railroad equipment and facilities in the state of Montana and intestate commerce in the United States; to engage in any lawful act or activity for which a corporation may be organized under the laws of the state of Montana, except for the purpose of banking or insurance.

IV.

REGISTERED OFFICE AND AGENT: The street address of the initial registered office of the corporation in the state of Montana, is at 300 W. Commercial, Anaconda, Montana, 59711, and the name of its initial registered agent as such address is J. W. Greene.

V.

DIRECTORS: The number of directors constituting the initial board of directors shall be seven (7), and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualified are:

J. W. Greene, Star Route East, Anaconda, Montana 59711;
Anna Rose Greene, Star Route East, Anaconda, Montana 59711;
David M. Bisch, 2010 W. Park Avenue, Anaconda, Montana 59711;
Marilou Bisch, 2010 W. Park Avenue, Anaconda, Montana 59711;
William T. McCarthy, 1117 W. Third, Anaconda, Montana 59711;
Chieko McCarthy, 1117 W. Third, Anaconda, Montana 59711;
William R. Tait, 2509 Phillips, Butte, Montana 59701.

The number of directors which shall constitute the whole board of directors shall be such as from time to time shall be fixed by, or in the manner provided in, the bylaws, but in no case shall the number be less than five (5).

VI.

INCORPORATORS: The names and addresses of the incorporators of this corporation are:

J. W. Greene, Star Route East, Anaconda, Montana 59711
William T. McCarthy, 1117 W. Third, Anaconda, Montana 59711
David M. Bisch, 2010 W. Park Avenue, Anaconda, Montana 59711.

VII.

POWERS: To have and to exercise all the powers now or hereafter conferred by the laws of the state of Montana upon corporations; to do all and everything necessary, suitable, or proper for the accomplishment of any of the purposes or the attainment of any of the objectives, or the exercise of any of the powers herein set forth or authorized by law.

VIII.

CAPITAL STOCK: The corporation is authorized to issue One Thousand (1,000) shares of capital stock of the par value of One Hundred Dollars ($100.00) per share. The stock of the corporation is and shall be non-assessable without appropriate action by the stockholders of the corporation.

IN WITNESS WHEREOF, these articles of incorporation have been executed by the directors and incorporators named herein this *28th* day of *February*, 1985.

s/ I. W. Greene

s/ W. T. McCarthy

s/ D. M. Bisch

SECRETARY OF STATE

STATE OF MONTANA

CERTIFICATE OF MERGER

I, JIM WALTERMIRE, Secretary of State of the State of Montana, do hereby certify that the Articles of Merger of RARUS, INC., a Montana corporation, into RARUS RAILWAY COMPANY, a Montana corporation, the surviving corporation, duly executed pursuant to the provisions of Section 35-1-805, Montana Code Annotated, have been received in my office and conform to law.

NOW, THEREFORE, I, JIM WALTERMIRE, as such Secretary of State, by virtue of the authority vested in me by law, hereby issue this Certificate of Merger to RARUS RAILWAY COMPANY, a Montana corporation, and attach hereto a copy of the Articles of Merger.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this December 31, A.D. 1986.

s/ Jim Waltermire

(GREAT SEAL)

JIM WALTERMIRE
Secretary of State

ARTICLES OF MERGER PURSUANT TO SECTION 35-1-804, MONTANA CODE ANNOTATED OF RARUS, INC.

Pursuant to the provisions of § 35-1-804, Mont. Code Ann., the undersigned corporation hereby adopts the following articles of merger for the purpose of merging Rarus, Inc. into Rarus Railway Company, a Montana corporation, which will be the surviving corporation.

FIRST: The plan of merger is that Rarus, Inc. would be merged into Rarus Railway Company with Rarus Railway Company the surviving corporation. The outstanding shares of stock of Rarus, Inc. would be redeemed and cancelled and Rarus Railway Company would then issue 100 shares of stock to the shareholders of Rarus, Inc. whose shares were redeemed. The 100 shares of stock of Rarus Railway Company would be issued as follows: 33.4 shares issued to J. W. Greene; 33.3 shares issued to David M. Bisch and 33.3 shares issued to William T. McCarthy.

There will be no changes in the articles of incorporation of Rarus Railway Company, the surviving corporation as a result of the proposed merger.

It is not possible to effectuate the purposes for which Rarus, Inc. was incorporated, i.e., to performing the planning, layout and construction of all types of railroad facilities, including, but not limited to, roadbeds, ballast, ties, trackage, bridges, culverts, roads, loading and unloading facilities and to repair, maintain and rebuild all types of railroad equipment and rolling stock. Therefore, it is necessary to merge Rarus, Inc. into Rarus Railway Company pursuant to the merger.

SECOND: The number of shares outstanding of Rarus, Inc. is 100 shares. 100 shares voted in favor of the

plan of merger and 0 shares voted against the plan of merger.

THIRD: A resolution was unanimously adopted by the board of directors of Rarus, Inc. approving a plan of merger. The resolution was adopted by the board of directors at a special meeting of the board of directors on December 30, 1986.

FOURTH: The shareholders of Rarus approved the plan of merger at a special meeting on December 30, 1986.

DATED this 30th day of December, 1986.

RARUS, INC.

By s/ D. M. Bisch
David M. Bisch, President

ATTEST:

s/ Marilou Bisch
Marilou Bisch, Secretary

STATE OF MONTANA)
: ss.
County of Silver Bow)

On this 30th day of December, 1986, before me, a Notary Public for the State of Montana, personally appeared David M. Bisch and Marilou Bisch, known to me to be the president and secretary of Rarus, Inc. respectively

whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year in this certificate first above written.

s/ J. Richard Orizotti
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission Expires: 11/10/87

ARTICLES OF MERGER PURSUANT TO SECTION 35-1-804, MONTANA CODE ANNOTATED OF RARUS RAILWAY COMPANY

Pursuant to the provisions of § 35-1-804, Mont. Code Ann., the undersigned corporation hereby adopts the following articles of merger for the purpose of merging Rarus, Inc. into Rarus Railway Company, a Montana corporation, which will be the surviving corporation.

FIRST: The plan of merger is that Rarus, Inc. would be merged into Rarus Railway Company with Rarus Railway Company the surviving corporation. The outstanding shares of stock of Rarus, Inc. would be redeemed and cancelled and Rarus Railway Company would then issue 100 shares of stock to the shareholders of Rarus, Inc. whose shares were redeemed. The 100 shares of stock of Rarus Railway Company would be issued as follows: 33.4 shares issued to J. W. Greene; 33.3 shares issued to David M. Bisch and 33.3 shares issued to William T. McCarthy.

There will be no changes in the articles of incorporation of Rarus Railway Company, the surviving corporation as a result of the proposed merger.

It is not possible to effectuate the purposes for which Rarus, Inc. was incorporated, i.e., to performing the planning, layout and construction of all types of railroad facilities, including, but not limited to, roadbeds, ballast, ties, trackage, bridges, culverts, roads, loading and unloading facilities and to repair, maintain and rebuild all types of railroad equipment and rolling stock. Therefore, it is necessary to merge Rarus, Inc. into Rarus Railway Company pursuant to the merger.

SECOND: The number of shares outstanding of Rarus Railway Company is 80 shares. 80 shares voted in favor of

the plan of merger and 0 shares voted against the plan of merger.

THIRD: A resolution was unanimously adopted by the board of directors of Rarus Railway Company approving a plan of merger. The resolution was adopted by the board of directors at a special meeting of the board of directors on December 30, 1986.

FOURTH: The shareholders of Rarus approved the plan of merger at a special meeting on December 30, 1986.

DATED this 30th day of December, 1986.

Rarus Railway Company

By s/ D. M. Bisch
David M. Bisch, President

ATTEST:

s/ Norman Rustad
Norman Rustad, Secretary-Controller

STATE OF MONTANA)
: ss.
County of Silver Bow)

On this 30th day of December, 1986, before me, a Notary Public for the State of Montana, personally appeared David M. Bisch and Norman Rustad, known to me to be the president and secretary of Rarus Railway

Company respectively whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year in this certificate first above written.

s/ J. Richard Orizotti
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission Expires: 11/10/87

TO: THE HONORABLE JIM WALTERMIRE
Secretary of State
Montana State Capitol
Helena, MT 59620

218023
State of Montana
FILED
May 27, 1988
Jim Waltermire
Secretary of State

Filing Fee: $5.00 60301

STATE OF MONTANA
STATEMENT OF CHANGE OF REGISTERED AGENT OR

REGISTERED OFFICE, OR BOTH, OF CORPORATION

For the purpose of having and continuously maintaining a registered agent at a registered office with the State of Montana, according to 35-1-305, 35-1-1012, 35-2-202, or 35-2-811, MCA, the undersigned submits the following statements of fact to the Secretary of State.

1. The exact name of the corporation is: RARUS RAILWAY COMPANY

2. The name of the present registered agent is: D. M. Bisch

3. The name of the new registered agent is: W. T. McCarthy

4. The address of the present registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711

5. The address of the new registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711
(Include street name and number or physical location in addition to box number with the city and zip)

6. The undersigned further states that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

7. Such change was authorized by resolution duly adopted by its board of directors.

8. By my signature below, I, an officer of the above corporation, do state that I signed this statement on behalf of the corporation and that the statements therein contained are true, under penalty of false swearing.

RARUS RAILWAY COMPANY
Exact name of corporation

s/ N. A. Rustad	Secretary-Controller	5/26/88
Signature of Officer	Title of Officer	Date

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 90-212

PACIFIC POWER & LIGHT CO., PUGET SOUND POWER & LIGHT CO., THE WASHINGTON WATER POWER COMPANY, PORTLAND GENERAL ELECTRIC CO., AND MONTANA POWER CO., Plaintiffs and Appellants, v. THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al., Defendants and Respondents.	FILED FEB 14 1991 Ed Smith Clerk of Supreme Court State of Montana ORDER

The petition for rehearing is denied.

DATED this 14th day of February, 1991.

TURNAGE, C.J., and HARRISON, BARZ, HUNT, McDONOUGH, WEBER, AND SHEEHY, JJ., concur.

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

PACIFIC POWER AND LIGHT COMPANY, et al.,	)	Cause Nos.
	)	ADV-86-069
Plaintiffs,	)	ADV-87-081
	)	ADV-88-032
- vs -	)	
	)	ORDER
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al.,	)	
Defendants.	)	

Cause Nos. CDV-86-069, ADV-87-081, and ADV-88-032 constitute this consolidated proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA. Plaintiffs are seeking a determination of the validity of the beneficial use tax set forth in Section 15-24-1203, MCA, which has been assessed against them for the years 1986 and 1987 with regard to the 500 kV transmission lines between Hot Springs, Montana and the Idaho border and between Garrison and Taft, Montana. Also originally included in this case was the question of the validity of the imposition of the beneficial

use taxes upon Plaintiffs for their use of the Townsend to Garrison 500 kV transmission line system and facilities for tax years 1985, 1986, and 1987. This Court determined that imposition of such taxes was valid when it granted Defendants' motion for summary judgment in November 1988.

Plaintiffs are 1) Pacific Power and Light Company (Pacific), an assumed business name for the electric utility operations of PacifiCorp, a Maine corporation which provides retail electric utility service to customers located in Oregon, Washington, Wyoming, California, Idaho, and Montana; 2) Puget Sound Power and Light Company (Puget), a Washington corporation which provides retail electric utility service to customers located in the western Washington area; 3) Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers located in Oregon; 4) Washington Water Power Company (Washington Water), a Washington corporation which provides retail electric utility service to customers located predominately in Washington and Idaho; and 5) the Montana Power Company (MPC), a Montana corporation which provides retail electric service to customers located in Montana. MPC and Puget own an undivided interest in Colstrip Units 1 and 2. Each Plaintiff owns an undivided interest in Colstrip Unit 3, and four of the five Plaintiffs own an undivided interest in Colstrip Unit 4. Collectively, Plaintiffs are referred to as the "Colstrip Owners."

Defendants are the Montana Department of Revenue (DOR), an administrative agency of the state of Montana charged with administering the tax laws of the state of Montana; the counties of Jefferson, Broadwater, Powell, Granite, Missoula, Mineral, and Sanders, political subdivisions for the state of Montana; the treasurers of the above counties, Susan Miller, Irene Kemmer, Dalice M. Cook, Harriet L. Ryan, Fern Hart, Billye An Bricker, and

June Thayer; and Ed Argenbright (now Nancy Keenan), the State Superintendent of Public Instruction.

Most of the background for this case is the same as that set forth on pages 3 - 22 of this Court's order in Cause No. 50978 dated December 21, 1987 which was affirmed by the Montana Supreme Court in *Pacific Power and Light v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1176, 46 St. Rep. 636 (1989) and on pages 2-9 of this Court's order in Cause No. ADV-86-200 dated January 19, 1988 which was affirmed by the Montana Supreme Court in *Portland General Electric Company v. Montana Department of Revenue* ___ Mont. ___, 773 P.2d 1189, 46 St. Rep. 839 (1989). In *Portland General Electric*, the Montana Supreme Court set forth some of the background of this case as follows:

> In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 kV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 kV lines providing access to the west.
>
> From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 kV lines. Notably, appellant [PGE] entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl Substation in Oregon. [Other plaintiffs had different delivery points.] PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 kV transmission line connecting Garrison to the Federal 500 kV Transmission System first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote to Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accommodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 kV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 kV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison

substation, until the Garrison-Taft 500 kV lines were completed.

DOR prepared a beneficial use tax assessment for each of the Colstrip Owners' interest in the Garrison-Taft and the Hot Springs-Border 500 kV transmission lines for the tax years 1986 and 1987. DOR used the unit valuation method in arriving at its assessment. The unit approach to valuation utilizes three indicators to obtain a value: the cost indicator, the income indicator, and the market or stock and debt indicator. Through the cost indicator, DOR tried to get an idea of the physical cost of the property. First, DOR obtained the cost of the specific line for a specific year. Then, DOR allocated the cost to the Owners by relying on the Owners' transmission demands set forth in their Garrison-West Agreements. For example, BPA reported that the cost of the Garrison-Taft line for 1986 was $184,742,794. Washington Water's transmission demand was 393,000 out of a total transmission line capacity of 1,915,000 or 20.52% of total transmission. This percentage of 20.52 multiplied by the total cost of $184,742,794 resulted in an allocated cost to Washington Water of $39,032,969. In its initial assessment of Garrison-Taft for 1986, DOR integrated this allocated cost into Washington Water's individual cost indicator and then weighted the entire cost indicator by 40%. [In Cause Nos. 50978 and ADV-86-200, DOR also integrated the allocated cost into each owner's individual cost indicator and then weighted the entire cost indicator by 40%.]

DOR subsequently issued revised assessments in which the allocated cost was *first* multiplied by *50%* and then added to the allocated Montana value as an *additive*. Plaintiffs resisted Defendants' motion for summary judgment with regard to imposition of taxes for use of the Townsend-Garrison line for tax years 1985, 1986, and 1987 on the basis that the 50% additive was different than the 40% solution used in Cause Nos. 50978, ADV-86-200, and in

the initial assessments in this consolidated case. Plaintiffs argued:

> This Court explicitly relied upon "the 40 percent solution" in its Order upholding the Department's imposition of taxes on the Colstrip Owners in that cause [50978]. . . . In subsequent years, however, the Department's methodology flip-flopped; *now* the Department first determines each utility's unit value *without* the beneficial use property and then adds 50 percent of the cost of the federal facilities before allocating value to Montana. "The 40 percent solution" has gone by the wayside.

In granting Defendants' motion for summary judgment, this Court stated: "[T]his Court recognized the forty percent solution while addressing Count 1 of Plaintiffs' complaint, the supremacy clause claim. This Court did not 'explicitly rely' on the forty percent solution in such order." This Court also held that the difference between the forty and fifty percent methodologies was not a genuine issue of material fact.

Plaintiffs also attempted to amend their complaints on the basis of DOR's revisions. However, in their brief in support, Plaintiffs repeatedly admitted that:

> assessment revisions may be challenged only by appeal to the State Tax Appeal Board.

(Plaintiffs' Brief filed July 8, 1988, p. 1, ll. 22-23)

> [t]he sole manner for challenging revisions is by appeal to STAB under 15-8-601(3)(c), MCA. . . .

(*Id.* at p. 2, ll. 23-25)

> Again, because the sole route for challenging revisions to assessments is to go to STAB, . . . it appears clear that STAB has exclusive jurisdiction first to review these arguments.

(*Id.* at p. 5, ll. 1-5)

This Court agreed with Plaintiffs that under Section 15-8-601(3)(c), MCA, STAB has jurisdiction over Plaintiffs' challenges to DOR's revisions in assessments. Therefore, Plaintiffs' motion to amend its complaints in order to add such challenges was denied.

Plaintiffs stated that they did appeal the revised assessments to STAB on five separate grounds:

> 1. [T]he revisions employed an incorrect depreciation period.
>
> 2. [DOR] taxed those facilities as if they had been in operation all year.
>
> 3. [T]he Department made a factual error . . . [which] was caused by its misreading of BPA Garrison-West contracts in effect on the assessment date; the Department incorrectly assumed that the "reserved transmission demands" . . . were at the maximum amount as of December 31, 1985.
>
> 4. [T]he Department's revisions tax the Colstrip Owners as if *all* Colstrip power were flowing over the Garrison-Taft 500 kV facilities and *none* were flowing over the 230 kV federal facilities west of Garrison.
>
> 5. [T]he Department's treatment of the federal facilities as "Class Eleven" property was

> erroneous, for Montana statutes establish that those facilities should be taxed as "Class Four" property.

(Plaintiffs' Brief in Support of Plaintiffs' Motion for Stay)

Arguing that "each of these five specifications of error involve[d] factual determinations regarding value and methodology, as opposed to pure questions of law," Plaintiffs filed a motion to stay requesting that this Court "postpone hearing the legal questions related to such values until after STAB decides the underlying factual and methodological issues." Plaintiffs' motion was denied on the basis that 1) there were no legal questions with regard to Plaintiffs' valuation claims pending before this Court; 2) this Court, not STAB, is the finder of fact with regard to the beneficial use tax cases; and 3) this Court does not have jurisdiction to address the appropriateness of any valuation.

Although Defendants' motion for summary judgment was granted and Plaintiffs' motion to amend and motion to stay were denied, Plaintiffs were allowed to present evidence concerning the subject matter of those motions insofar as it even tangentially applied to the claims set forth in this case.

The law applicable to this case was established by the Montana Supreme Court in *Pacific Power* and *Portland General Electric*. Under the doctrine of stare decisis "a deliberate or solemn decision of the court made after argument on a question of law fairly arising in the case, and necessary to its determination, is . . . *binding precedent . . . in other courts of lower rank in subsequent cases where the very point is again in controversy.*" [Emphasis supplied] *Black's Law Dictionary*, 1261 (rev. 5th ed. 1979). In *State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 525, 44 P.2d 747, 749 (1935), the Montana Supreme Court explained the purpose of the doctrine, as follows:

> We realize the force and the wisdom of the rule of stare decisis. We are not unmindful of the fact that principles of law should be positively and definitely settled in order that courts, lawyers and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be charged from day to day, with the resultant disorders that of necessity must accrue from such changes.

This Court *must follow and adhere to principles of law established in Pacific Power and Portland Gen. Elec.*

Plaintiffs set forth eight counts alleging that the imposition of the beneficial use tax is illegal. (In CDV-86-69, Plaintiffs set forth only seven of the eight counts.) All of the counts are the same or very similar to the seven counts set forth in Cause No. 50978 and the eight counts set forth in Cause No. ADV-86-200, both of which have been affirmed by the Montana Supreme Court. Thus, both opinions are equally applicable to the eight counts raised in these consolidated cases. This Court realizes that Plaintiffs presented a great deal of additional evidence, especially with regard to the fifty percent revision, the issues presented to STAB and those contained in their motions to amend and to stay. However, none of this evidence convinces this Court to change any of its earlier orders in this case nor to adjust any of the reasoning therein. In addition, none of this evidence proves Plaintiffs' claims in this consolidated case. Thus, due to lack of evidence proving Plaintiffs' claims and also in light of this Court's opinion in Cause No. 50978 as affirmed by *Pacific Power* and this Court's opinion in Cause No. ADV-86-200 as affirmed by *Portland General Electric*, this Court finds that Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory

or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED.

DATED this 25th day of January, 1990.

s/ Henry Loble
DISTRICT COURT JUDGE

pc: Counsel of Record

**PACIFIC POWER & LIGHT COMPANY,
Puget Sound Power & Light Company,
Portland General Electric Company,
Washington Water Power Company,
and the Montana Power Company,
Plaintiffs and Appellants,**

v.

**MONTANA DEPARTMENT OF REVENUE, et al.,
Defendants and Respondents.**

No. 88-151.

Supreme Court of Montana.

Submitted Feb. 21, 1989.

Decided April 17, 1989.

Rehearing Denied June 1, 1989.

Donald R. Murray, Murphy, Robinson, Heckathorn and Phillips, Kalispell, Thomas H. Nelson, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for plaintiffs and appellants.

Larry Schuster, Montana Dept. of Revenue, Property Tax Div., Helena, for defendants and respondents.

GULBRANDSON, Justice.

Appellants appeal the order of the First Judicial District Court, Lewis and Clark County, in a declaratory judgment action, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes for the year 1984 against the appellants pursuant to § 15-24-1203, MCA. These beneficial use taxes were assessed for the appellants' firm transmission demands

upon certain Bonneville Power Administration (BPA), 500 kilovolt (KV) transmission lines located between Townsend, Montana and Garrison, Montana. We affirm the order of the District Court.

In the mid-1970s, two mine-mouth, coal-fired electric generating plants were built by Montana Power Company (MPC) and Puget Sound Power and Light Company (Puget), at Colstrip, Montana. Each of these plants produce 330 megawatts of electrical power consuming 30 megawatts internally at each plant. These plants have been operated and maintained by the Montana Power Company since being placed in service in 1975 and 1976.

To market the power produced by Colstrip Units I and II, two 230 KV electrical transmission lines were built to transmit the power from Colstrip to a point near Broadview, Montana. Other 230 KV lines moved the energy from Broadview to markets or "loads" located in western Montana and the Pacific Northwest. This system of 230 KV lines proved adequate for transmitting the energy generated from Colstrip Units I and II.

In the late 1970s and early 1980s, MPC and Puget, in conjunction with Portland General Electric Company (PGE), Washington Water Power Company (WWP) and Pacific Power and Light Company (PPL) foresaw an increased demand in the Pacific Northwest for electrical power. Consequently, they decided to build Colstrip Units III and IV. (Colstrip Units III and IV each have a generation capacity of 770 megawatts (MW) of electrical power with each plant consuming approximately 70 MW internally.) These five companies, the appellants in this case, were the owners of undivided interests in Colstrip Units III and IV at the time of the assessment of the beneficial use taxes which are the subject of this litigation. They shall hereinafter be collectively referred to as the Owners.

Realizing that the existing system of 230 KV transmission lines would be insufficient to transmit the additional 1,400 MW produced by Colstrip Units III and IV in 1977, the Owners entered into negotiations with the BPA to build two 500 KV transmission lines from Townsend to the BPA's existing 500 KV lines at Taft, Montana.

The Owners would convert the existing 230 KV lines stretching from the Colstrip generating point to a substation located at Broadview, Montana, into 500 KV lines. They then would construct new 500 KV lines from Broadview, Montana to the anticipated BPA 500 KV lines beginning in Townsend.

For its part, the BPA executed two primary agreements with the Owners. These agreements stated the BPA would construct and operate those 500 KV lines referred to as the Montana Intertie line, which runs from Townsend, Montana to Garrison, Montana, and the Garrison West line, which runs from Garrison, Montana, to a point designated as the Taft substation on the Montana-Idaho border. These lines would link with the BPA's currently existing 500 KV system at the Taft substation.

In preparation for Colstrip Unit III going on-line in January, 1984, the BPA completed construction of the 500 KV lines from Townsend, Montana to Garrison, Montana, in 1983. There is no substation at the point where the BPA and Owners' lines meet near Townsend. The BPA completed the Garrison West line in 1986. This facilitated the transmission of Colstrip Unit IV power to the Taft substation and points to the west.

In 1983, the Montana Legislature, realizing use of the proposed BPA 500 KV lines extending from Townsend to Taft would be exempt from state property taxes, passed an

amendment to § 15-24-1203, MCA, to close the loophole which provided this tax windfall. The amendment provides for the assessment of a beneficial use tax against users of exempt electrical transmission lines having a 500 KV or greater rating. After passage of this amendment, the DOR begin meeting with the Owners, their representatives and the BPA to determine a value for the Montana Intertie line which would be placed in service in 1984.

A definite value for the Montana Intertie line had not been established by early 1984. The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement. The Owners protested the imposition of these beneficial use taxes and this lawsuit resulted.

In 1985 and each subsequent year, the DOR has assessed beneficial use taxes against the Owners for their use of the 500 KV lines referred to in this opinion and in each case the Owners have protested and filed lawsuits seeking declaratory injunctive relief from the imposition of those taxes. The individual facts of those cases are not dealt with in this opinion.

The Owners present seven separate issues in this appeal:

1. Whether the Owners' lacked that sufficient "Beneficial Use" of the subject facilities necessary for the imposition of beneficial use taxes under § 15-24-1203, MCA?

2. Whether the challenged taxes violate the Commerce Clause of the United States Constitution?

3. Whether the challenged taxes violate the Supremacy Clause of the United States Constitution?

4. Whether the challenged taxes violate the guarantee of due process and equal protection found in the Fourteenth Amendment?

5. Whether the challenged taxes violate the "Private Interests" clause of the Montana Constitution?

6. Whether the challenged taxes violate the "Retrospective Laws" clause of the Montana Constitution?

7. Whether the challenged taxes violate the "Impairment of Obligation of Contracts" clause of the Montana Constitution?

BENEFICIAL USE

A state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established. *United States v. County of Fresno* (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, these taxes must be imposed equally on others similarly situated. *Id.* at 462, 97 S.Ct. at 705, 50 L.Ed.2d at 692. The policy reason for allowing these taxes is to prevent the unfair trade advantage accruing to those private users of exempt properties over their competitors who must pay *ad valorem* taxes on similar, privately held properties. *Id.* at 463, 97 S.Ct. at 705, 50 L.Ed.2d at 692-693.

The Owners maintain that the beneficial use taxes may not be imposed upon them as they do not have a beneficial

interest in or receive a beneficial use from the 500 KV lines. They contend in order to impose beneficial use taxes the state must show that the Owners have possession of the exempt property and that this possession is exclusive, excluding other users of the lines and restricting physical access to the property. As evidence of their lack of possession or exclusive use, the Owners cite to the following facts. The maintenance and actual operation of the Townsend to Garrison 500 KV lines is controlled by the BPA. The BPA has reserved 185 MW of East to West transmission capacity unto itself and the Owners do not have access to the West to East transmission capacity over the Montana Intertie. Further, the testimony of experts at trial and in depositions established that it is impossible to identify the exact path that electrical power will follow when introduced into an integrated system such as exists between Colstrip and Garrison. In other words, one cannot identify whether the Owners' Colstrip power injected into the system at Colstrip flows over the 500 KV transmission lines or over other existing 230 KV transmission lines which interact with the 500 KV lines at the Broadview and Garrison substations.

We find, however, that the Owners do possess a sufficient beneficial use interest in the 500 KV lines, from Townsend to Garrison, which justifies the imposition of beneficial use taxes.

The United States Supreme Court has defined "beneficial use," in a case arising out of Missoula County, Montana, as follows:

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is

> recognized by law, and can be enforced by the courts, at the suit of such owner or of someone in his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402. See also *Harrison v. City of Missoula* (1965), 146 Mont. 420, 407 P.2d 703. Further the U.S. Court of Appeals for the Ninth Circuit has recognized a state may tax those contract rights granting such a beneficial use interest. *International Paper Co. v. County of Siskiyou* (9th Cir.1974), 515 F.2d 285. In the *International Paper Co.* case the counties attempted to tax the companies' interest in standing timber located in national forests. Under the sale contracts, title to the timber remained with the Forest Service until it had been cut, scaled and paid for. The Ninth Circuit held that the timber property, from which the company derived profit, was not exempt from taxation merely because the United States retained legal title to it as security. *Id.* at 289, citing *S.R.A., Inc. v. State of Minnesota* (1946), 327 U.S. 558, 570, 66 S.Ct. 749, 756, 90 L.Ed. 851, 860.

In the present case, the Colstrip Owners have an enforceable contract interest which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. The Montana Intertie Agreement gave the Owners the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power. This right is subject only to the BPA's ability to transmit these amounts onward from the Garrison substation. We note the project scheduled power, (the amount of electric power each company schedules on an hour over the Montana Intertie up to the maximum allowed for each Company's East-West transmission demand) remained under the ownership of the Owners.

The Owners have exercised this right and used these lines to transmit power for their own commercial profit-making activities. Further, absent the transmission of any BPA or non-firm energy, the Owners are responsible for the total annual cost of the lines. The total annual cost of the transmission lines includes the cost of the government's investment in the Montana Intertie line and the Garrison substation, the annual cost of operating and maintaining the transmission line system, the BPA's administrative costs attributable to the lines and the cost to BPA of any impact-aid payments. The payment formula provides that the Owners receive a credit for BPA and non-firm transmission over the lines. The Owners are liable for these payments whether they use the lines or not. Under such an arrangement, we find the Owners clearly have a beneficial use interest in the Montana Intertie 500 KV lines.

The Owners contend, however, that even if a beneficial use existed, the interest was not exclusive, and thus it could not be taxed. The Owners assert they have no reservation of the remaining 185 MW of East to West transmission capacity nor to any of the West to East transmission capacity of the lines. Therefore, the imposition of beneficial use taxes resulted in the Owners being taxed on the full value of the property when they only had use of part of the lines. *United States v. County of Allegheny* (1944), 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

This argument is without merit as the Montana Intertie Agreement provided that the BPA could not exercise its East to West reservation until the Garrison West 500 KV lines were operational. Thus, the BPA had no right to exercise its reservation in 1984, the year in which the taxes in this case were imposed. Secondly, testimony at trial established that the BPA would only allow reservation of a firm transmission demand on the West to East capacity of the lines if a requesting party showed a demonstrated

need for use of the lines. Until such a demonstrated need was shown, the only firm transmission users of the lines were the Owners, for whom the lines were constructed, and the BPA.

Testimony at trial established that the Montana Intertie line consisted of two bi-directional 500 KV electrical transmission lines. These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously. These lines are stability limited at approximately 2,000 MW, although a BPA employee testified that actual loading of the system at capacity would be lower. In negotiating the Montana Intertie, the Owners and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW. Further, the Owners' intention has been to operate the Colstrip generating units as base loaded units. Base loaded generating units are intended to run at full capacity supplying constant power levels to the system.

We find the Montana Intertie 500 KV lines were built to transmit base load power from East to West. No other parties could use the lines because of the Owners' reservation of more than the amount which could be transmitted beyond the Garrison substation. Until other parties are able to exercise reservations in the lines' transmission capacity in either direction, at which time the Owners will be credited, the Montana Intertie's total capacity was reserved exclusively to the Owners. Consequently, the State had the statutory right to tax the Owners based upon the full value of the facilities.

COMMERCE CLAUSE

Having found the Owners possessed a taxable beneficial use interest in the exempt facility, we now address the Owners' claims that the imposition of these

taxes violated certain sections of the United States and Montana Constitutions. The Owners' first claim is that the imposition of beneficial use taxes on their use of the Montana Intertie line violated the Commerce Clause of the United States Constitution. The Owners contend that the Legislature intended to discriminate against interstate commerce by giving preferential treatment to Montana REA cooperatives and that the DOR has implemented the beneficial use statute in a discriminatory manner.

It is well established that a state may raise revenues by taking a private person or corporation's use of federal property within its jurisdiction, provided the state is taxing the possession or use of the property. *United States v. County of Fresno* (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, the fact that such a tax may have an impact on interstate commerce will subject the tax to commerce clause scrutiny. *Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609, 616, 101 S.Ct. 2946, 2952-2953, 69 L.Ed.2d 884, 893. A state may exact its fair share of the cost of state government from interstate commerce activities within the state, so long as the tax meets the test promulgated in *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326. *Commonwealth Edison*, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894. The *Complete Auto Transit* test requires, upon examination of the practical effect of the tax, that the tax be applied to an activity having a substantial nexus with the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state. *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331.

Applying this test to the facts in this case the Owners' activities, subject to the tax, had a substantial nexus to the State of Montana. They had exclusive contract rights to use approximately 90 miles of BPA 500 KV transmission lines across Montana. These lines were constructed for the

purpose of transmitting the Owners' electrical power generated at Colstrip, Montana to Garrison, Montana, and from there to the Owners' service loads. Further, as the Montana Intertie line is entirely within the state there is no potential for multiple state taxation of the use of the facilities. No other state would have jurisdiction to impose beneficial use taxes on these facilities. See, *Commonwealth Edison*, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894.

Similar to the appellants in *Commonwealth Edison*, the Owners contend the tax assessed had a discriminatory effect on interstate commerce as the majority of the electrical power transmitted over these lines was destined for out-of-state consumers. These beneficial use taxes thus effectively exported the state's tax burden. However, as in *Commonwealth Edison*, the tax was computed at the same rate regardless of the destination of the power transmitted. MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines. The fact the Legislature realized the brunt of the tax would fall upon out-of-state users of these lines would not invalidate the tax.

As stated by the United States Supreme Court:

> [M]otives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. (Citations omitted.) Least of all will they be permitted to accomplish that result when equity and not preference is the end to be achieved.

Henneford v. Silas Mason Co. (1937), 300 U.S. 577, 586, 57 S.Ct. 524, 528, 81 L.Ed. 814, 820.

The Owners also contend this amendment effectively discriminates against bulk transferors of power by benefiting local users of the federal transmission system and those utilities and cooperatives which use lower

capacity transmission lines. In support of this contention the Owners point to the fact the amendment to the statute, § 15-24-1203, MCA, only applies to users of *500 KV and larger* electrical transmission lines. However, state legislatures have a wide range of choice when they classify or limit items subject to taxation. *Henneford*, 300 U.S. at 587, 57 S.Ct. at 529, 81 L.Ed. at 821, citing *Bell's Gap R. Co. v. Pennsylvania* (1890), 134 U.S. 232, 237, 10 S.Ct. 533, 535, 33 L.Ed. 892; *Ohio Oil Co. v. Conway* (1930), 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775, 781-782.

In the case at hand, the Legislature has identified a class of users of exempt property. This class consists solely of users of 500 KV and larger electrical transmission lines. These lines are used for the bulk transfer of electrical power. In this specific instance the Owners have contracted with the BPA to construct and operate 500 KV lines. As a result of the Owners' contract with the BPA, the Owners have the use of these lines which they otherwise would have been forced to construct themselves. Absent the implementation of the beneficial use tax, the Owners would have received the use of the Montana Intertie transmission facilities, essential to the sale of Colstrip generated power, free of the taxes they would be subject to if they had constructed the lines themselves. We do not find the effect of the legislation was to unfairly tax out-of-state users of the lines, rather the effect is to prevent all users of such exempt lines from unfairly reaping a tax windfall.

The Owners point to cases where the United States Supreme Court and Federal courts have found that state taxes discriminate against interstate commerce in favor of local businesses or consumers. However, these cases are distinguishable. In *Boston Stock Exchange v. State Tax Comm'n* (1977), 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, the Supreme Court found a transfer tax on out-of-state sales of stocks violated the commerce clause. The Court

found that no state "may 'impose a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business.'" *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 607, 50 L.Ed.2d at 524, citing *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421, 427. In the case at hand, however, the beneficial use tax has been imposed upon both local and interstate users of the 500 KV lines for the purpose of eliminating a tax windfall and competitive advantage which enure to the users of tax exempt federal property. This tax imposes no greater tax liability on interstate users of these lines than on instate users. See *Boston Stock Exchange*, 429 U.S. at 332, 97 S.Ct. at 608, 50 L.Ed.2d at 526.

Recently in the case of *United States v. City of Manassas, Va.* (4th Cir.1987), 830 F.2d 530, the Fourth Circuit Court of Appeals dealt with a Virginia statute which taxed users of federally owned property, but exempted users of similar state owned property from taxation. There the court found the controlling case for discriminatory state use taxes is *Phillips Chemical Co. v. Dumas School Dist.* (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. In *Phillips*, the Court held such taxes must be examined based on "how other taxpayers similarly situated are treated." requiring "'an examination of the whole tax structure of the state.' Cf. *Tradesmens National Bank v. Oklahoma Tax Comm'n*, [(1940)] 309 U.S. 560, 568, [60 S.Ct. 688, 693, 84 L.Ed. 947]." *Phillips*, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. The *Phillips* Court provided a two-part test for evaluating allegedly discriminatory state use taxes:

> 1) Are the users of federal property treated less favorably than similarly situated users of state property; and
>
> 2) If so, is that discrimination justified in light of the state and federal interest involved.

City of Manassas, 830 F.2d at 534. The Fourth Circuit Court of Appeals in *City of Manassas*, interpreted the justification in part two of the test as requiring a determination of whether the user of federal exempt property is similarly situated to a user of state exempt property. *City of Manassas*, 830 F.2d at 534.

At trial the only references to imposition of beneficial use taxes on state exempt property dealt with two short line railroads and the Great Falls Industrial Park. The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.

Since the trial, the 1987 Legislature amended § 15-24-1203, MCA, to exempt the beneficial use of railroad right-of-way and track acquired by the state through abandonment, provided the state retains ownership and the right-of-way and track are used exclusively for rail transportation. This amendment was not considered by the District Court in its order of December 21, 1987, and we

find it is not properly before this Court on appeal. *Hanley v. Dept. of Revenue* (1983), 207 Mont. 302, 673 P.2d 1257.

The fourth prong of the *Complete Auto Transit* test questions whether the tax is fairly related to the services provided by the taxing state. In *Commonwealth Edison*, the Court found the "operating incidence" of the tax was on the mining of coal in Montana. As the tax was measured as a proportion of the value of the coal taken, it was in proper proportion to the appellant's activities in the state. The present case involves an "operating incidence" similar to *Commonwealth Edison* which falls upon the Owners' beneficial use of exempt electrical transmission lines found within the state. This tax is measured as a percentage of the value of the property in which the Owners possess their beneficial use interest.

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. (Citations omitted.) When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" (Citations omitted.)

Commonwealth Edison, 453 U.S. at 626-627, 101 S.Ct. at 2958, 69 L.Ed.2d at 900. As the appropriate level of that tax percentage is a legislative matter, we find the tax fairly

reflects the taxpayer's activity in the state. *Id.* at 626-627, 101 S.Ct. at 2958-2959, 69 L.Ed.2d at 901.

SUPREMACY CLAUSE

The Owners' second claim is that the imposition of beneficial use taxes violated the supremacy clause of the United States Constitution. The Owners correctly assert there are two means by which a state tax may be invalidated under the supremacy clause. The state statute may be preempted by federal action or the tax may improperly place the legal incidence of the tax upon the property of the federal government.

The Owners contend that two federal statutes do in fact preempt Montana's imposition of beneficial use taxes upon private use of federally owned electrical transmission lines. The first is Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (Anti-Discrimination Act) (1982). This statute provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This statute has been examined in *Arizona Public Service Co. v. Snead* (1979), 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106. There the Court examined New Mexico's tax on electrical generation and complimentary tax credit for electrical sales in New Mexico. The effect of this credit was

to eliminate the 2 percent electrical generation tax for sales to New Mexico's electrical consumers, while taxing sales to out-of-state consumers. 15 U.S.C. § 391 (1982) was passed specifically to outlaw such taxes which place a greater tax burden upon electricity generated or transmitted in interstate commerce. The Court found that because the electrical energy tax indirectly discriminated against electricity sold outside the state, it violated the federal statute. *Arizona Public Service Co.*, 441 U.S. at 150, 99 S.Ct. at 1634, 60 L.Ed.2d at 113. The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally. *Id.* at 150-151, 99 S.Ct. at 1634, 60 L.Ed.2d at 114.

Initially, we note that no credit is provided under Montana's beneficial use tax to anyone affected by its imposition and none is alleged. Further, the beneficial use tax on 500 KV electrical transmission lines applies equally to intrastate and interstate users of these lines. Testimony at trial established that Montana Power Company removed all of its power from the system at the Garrison substation for transmission to its load customers. MPC as an intrastate user is taxed at the same rate as the other users of the facilities. Also, this tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

The Owners next contend 16 U.S.C. § 839e(m) preempts § 15-24-1203, MCA. This statute provides for the payment of impact-aid payments to offset the added cost to affected counties for the three construction phases of the Montana Intertie line. The three construction phases are pre-construction, which was complete before the Act was passed, construction, for which the three affected counties received over $150,000 in impact-aid payments, and post-construction. In the post-construction phase the counties

may bill the BPA for any services provided as a result of the presence of the lines. The Owners' contention that these impact-aid payments were in lieu of taxes fails in light of testimony at trial. At trial, BPA's project information officer for the Colstrip transmission project testified that these impact-aid payments were not intended to be in lieu of taxes which the counties were losing as a result of federal ownership of the 500 KV lines. This statement is reinforced by U.S. Representative Dingell's statement contained in the environmental impact statement. 48 Fed.Reg. 55765. ("This is not a payment-in-lieu of taxes provision.")

The Owners also advance an implied preemption argument based upon a line of cases holding that preemption may be inferred when a scheme of federal regulation leaves no room for state regulation, or when the regulation is so dominant as to "preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Medical Laboratories* (1985), 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714. The argument fails, however, in light of our previous findings regarding statutory preemption. The impact-aid payments contained in 16 U.S.C. § 839e(m), do not preclude a state's right to levy taxes on a private party's beneficial use interest in exempt federal transmission facilities. Further, 15 U.S.C. § 391 only precludes the implementation of a state tax scheme which places a greater tax burden on generation or transmission of electricity placed in interstate commerce. As previously stated the Montana beneficial use tax is levied on the beneficial use of the facilities and is equally applied to interstate and intrastate users of the facilities.

The Owners' last supremacy clause argument is that the legal incidence of the beneficial use tax falls on the federal government. In order to find a state tax on use of such exempt properties unconstitutional under a legal incidence argument, the taxed entity must be "so

intimately connected with the exercise of a power or the performance of a duty' by the Government that taxation of it would be 'a direct interference with the function of government itself.'" *United States v. New Mexico* (1982), 455 U.S. 720, 736, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 593, citing *James v. Dravo Contracting Co.* (1937), 302 U.S. 134, 157, 58 S.Ct. 208, 219, 82 L.Ed. 155, 171. Where the legal incidence of the tax falls on a private party, and they are independent entities from the United States, the tax cannot be considered a tax on the government itself. *U.S. v. New Mexico*, 455 U.S. at 738, 102 S.Ct. at 1385, 71 L.Ed.2d at 594. In the *New Mexico* case, the government sought to show that beneficial use taxes, based upon management contracts which transferred payment of any state taxes imposed to the federal government, placed the legal incidence of the tax on the federal government. The United States Supreme Court found that the fact the federal property involved was being used for the government's benefit was irrelevant. *Id.* at 739, 102 S.Ct. at 1385, 71 L.Ed.2d at 595. The Court found the contractors remained "distinct entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.'" *Id.* at 739-740, 102 S.Ct. at 1385, 71 L.Ed.2d at 595, citing *United States v. Boyd* (1964), 378 U.S. 39, 44, 84 S.Ct. 1518, 1521-1522, 12 L.Ed.2d 713, 718. Such a tax does not fall upon the federal government, but rather upon the contractor's independent commercial enterprise.

In the instant case the tax is levied directly upon the Owners for their beneficial use of the federal government's facilities. There is no transfer of the tax liability to the government. In fact, the Montana Intertie Agreement provides any costs the government incurs by way of the Owners' use of these transmission lines are billable annually to the Owners. The "legal incidence" of the beneficial use tax in this case clearly falls upon the Owners and not upon the federal government.

The Owners argue that the imposition of these taxes on the Owners' use of the Montana Intertie line would adversely affect the government's ability to secure adequate lease fees from these types of lines. This argument must fail for two reasons. First, the United States Supreme Court has upheld use taxes even where the government by contract agrees to pay the state use or excise tax. See, *James v. Dravo Contracting Co.* (1937), 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. Second, in the contracts which grant the use in this case, the Owners are obligated not only to pay the cost of operating and maintaining the lines each year, (less credits for BPA transmissions and non-firm transmissions), but the cost of constructing these lines as well. Under such an arrangement it is implausible that imposing these taxes upon the use of the exempt lines would adversely impact the government's ability to secure adequate lease values.

FOURTEENTH AMENDMENT

The Owners contend the imposition of beneficial use taxes in this case violates the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution. The Owners contend that the Due Process Clause requires that the amount of the tax must bear some relation to the value of the property assessed against the taxpayer. *Norfolk & Western Railway Co. v. Missouri State Tax Commission* (1968), 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201. The Owners allege that the defendant counties have conferred no benefit upon the Owners because of their use of the Townsend to Garrison facilities, that the defendant counties have already been fully compensated through the impact-aid portions of the Montana Intertie Agreement and that the taxes imposed are based on the full value of the facilities. Further, the Montana Intertie Agreement gives appellants rights which are far less than full ownership.

State tax statutes will not normally be set aside based upon Due Process Clause violations, except in rare and unusual circumstances. *A. Magnano Co. v. Hamilton* (1934), 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109. Further, to attack the tax statute, the appellants must show a failure to satisfy two tests. First, the object of the tax must lack a nexus with the state imposing the tax, and second, the tax must fail to fairly reflect the taxpayer's activity in the taxing state.

Sufficient nexus with the state has already been established under the Commerce Clause section previously discussed. Additionally, we previously found under the fourth prong of the *Complete Auto Transit* test, that the tax is fairly related to the services provided by the state. Thus, there is no violation of the Due Process Clause.

The Owners contend the Equal Protection Clause invalidates the beneficial use tax because the state has not equally administered the beneficial use taxes. *Raymond v. Chicago Union Traction Co.* (1907), 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78; and *Larson v. State* (1975), 166 Mont. 449, 534 P.2d 854. The Owners claim that the Department has never attempted to apply the beneficial use tax in analogous situations, specifically referring to the Montana Rural Electrification Administration Cooperatives (REAs).

These REAs, as preference customers, are entitled to purchase federal power at a preferred or "Priority Firm Rate." This rate is lower than the rate investor-owned utilities are entitled to when they purchase federal power. These REAs also have a right to first call on federal power, before investor-owned utilities. The Owners claim the beneficial use taxes would be applicable to BPA's preference customers based on their use of the BPA transmission system, including the BPA's 500 KV lines. The Owners also contend this is the first attempt to apply the beneficial use tax upon any entity that did not have "exclusive use"

of the subject facilities. The Owners equate exclusive use to a requirement that they have possession of the facilities and transmission lines.

The standard which must be achieved to invalidate the tax on equal protection grounds is one of invidious discrimination, as opposed to the existence of a rational relationship. *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351. The existence of a rational relationship is met here by the intent to close the loophole which would have allowed these companies to avoid paying any taxes. In regard to the Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

We agree with the DOR that the Legislature was not required to tax all beneficial users before it could reach the beneficial users of 500 KV lines. ("[T]axation of certain objects need not be universal in nature.") Citing to *Louisiana v. Pilsbury* (1881), 105 U.S. 278, 26 L.Ed. 109. The Legislature in this case has identified beneficial users of 500 KV lines as a distinct tax classification.

THE MONTANA CONSTITUTION

Additionally, the Owners claim the imposition of beneficial use taxes in this case violates three provisions of the 1972 Montana Constitution. The Owners contend that while Art. VIII, sec. 5(1)(a) allows "private interests" in exempt properties to be taxed separately, such a tax necessarily requires the user to have possession. The Owners base this requirement of possession upon statement made at the Constitutional Convention that in closing an existing loophole the delegates provided for taxation of private interests in government-owned property, "things like right-of-ways and things like that ..." Further, the

Owners contend the Montana Supreme Court, in identifying an "interest" in real property as an estate, has implied one must have the right to possess and control property before beneficial use taxes may be imposed. *Brown v. Hart* (1984), 213 Mont. 517, 692 P.2d 14.

We disagree. What is involved here is a private contractual right to use a portion of the transmission capacity of the exempt Townsend-Garrison line. This private interest in exempt federal lands fits within the plain language employed by the 1972 Constitutional Convention delegates in closing this loophole contained in the prior constitution.

> (1) The legislature may exempt from taxation:
>
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately.
>
> . . . . .

Art. VIII, sec. 5(1)(a), 1972 Montana Constitution.

The Owners next claim that the imposition of beneficial use taxes on their use of the Montana Intertie line violates Art. XIII, sec. 1(3), prohibiting retrospective laws. Specifically the Owners contend that since the Montana Intertie Agreement was entered in 1981 and § 15-24-1203, MCA, was not amended to specifically include 500 KV transmission lines until 1983, the effect of imposing these taxes is precisely the type of retrospective action the 1972 Constitutional Convention was prohibiting.

We find several problems with the Owners' argument. First, the argument ignores the ongoing nature of their use of these lines. Second, this contention is weakened by

Art. VIII, sec. 5(1)(a) which specifically allows for taxation of the interests conveyed to the Owners under the Montana Intertie Agreement. We agree with the District Court that the position the Owners advance would have the effect of prohibiting all new forms of taxation. "The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise." *Westfield-Palos v. City of Rancho Palos Verdes* (1977), 73 Cal.App.3d 486, 141 Cal.Rptr. 36, 42, citing *John McShain, Inc. v. District of Columbia* (D.C.Cir.1953), 205 F.2d 882, 883.

> Only where the measuring formula for the tax draws upon such disparate or long past antecedents so as to have little relation to the volume of current business might a business license tax fall on retroactivity grounds. (Citations omitted.)

Westfield-Palos, 141 Cal.Rptr. at 42. We find that the beneficial use tax involved here, like the business license tax in *Westfield-Palos* applies to the ongoing, current business activity of the Owners. As such, the tax does not violate Art. XIII, sec. 1(3), of the 1972 Montana Constitution.

The Owners' final issue relies on Art. II, sec. 31, of the 1972 Montana Constitution in contending the imposition of these beneficial use taxes constitutes an impairment of their contract with the BPA. This argument is without merit as it has long been established that "[a] contract between individuals cannot have the effect of depriving the state or any municipal subdivision of any power of taxation otherwise belonging to it." *Forbes v. Mid-Northern Oil Co.* (1935), 100 Mont. 10, 22, 45 P.2d 673, 679, citing *Newman v. Commercial Waterway District* (Wash.1923), 125 Wash. 577, 217 P. 9. As long as the state does not violate a fundamental right of the individual, the state is free to vary the existing mode of taxation. *Forbes*, 45 P.2d at 679. As Art. II, sec. 31 of the 1972 Montana Constitution is

essentially identical to Art. 3, sec. 11 of the 1889 Montana Constitution, under which the *Forbes* case was decided, we find the Owners have presented no reason to find there has been any impairment of their contract.

CONCLUSION

The Owners enjoyed a beneficial use interest in the Montana Intertie Agreement 500 KV lines, which use we hold was properly taxable under § 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines and the fact the lines were constructed for the purpose of transmitting the Owners' electrical power generated at the Colstrip generating facilities. The State's levy of these beneficial use taxes did not violate the United States Commerce Clause, the United States Supremacy Clause, the Fourteenth Amendment to the United States Constitution, nor the cited sections of the Montana Constitution. Therefore we affirm the order of the District Court.

TURNAGE, C.J., and HARRISON, McDONOUGH, SHEEHY, HUNT and WEBER, JJ., concur.

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff and Appellant,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Defendants and Respondents.

No. 88-160.

Supreme Court of Montana.
Submitted Feb. 28, 1989.
Decided May 10, 1989.

Affirmed.

Donald R. Murray, Murphy, Robinson, Heckathorn & Phillips, Kalispell, Thomas H. Nelson, argued, Stoel Rives, Boley, Jones & Grey, Portland, Or., for plaintiff and appellant.

Larry G. Schuster, argued, Dept. of Revenue, Helena, for defendants and respondents.

HARRISON, Justice.

Appellant, Portland General Electric (hereinafter PGE), appeals an order entered by the Honorable Henry Loble, First Judicial District Court, Lewis and Clark County, Montana, denying injunctive and declaratory relief. We affirm.

This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983), for appellant's use of the Hot Springs to Idaho Border portion of the BPA

500 kilovolts (KV) transmission line system within the State of Montana.

> [T]here is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation ... The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Section 15-24-1203, MCA.

Much of the factual background surrounding this case has previously been discussed in our decision, *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176 (1989). Therefore, we will limit the extensive background discussion and instead focus on the additional facts relevant to this case.

PGE is an investor-owned utility which provides retail electric utility service to customers located in the State of Oregon. PGE owns an undivided 20% interest in Colstrip Units III and IV, which began operation in October of 1983 and 1985, respectively. The other four Colstrip owners are Pacific Power & Light Company, Washington Water Power Company, Puget Sound Power & Light Company, and Montana Power Company. Collectively, these companies are referred to as the "Colstrip Owners."

With the development of Colstrip Units III and IV, additional transmission capacity was needed from the Colstrip facilities to the west. To accommodate the increased generation, Colstrip Owners initially converted one 230 KV line extending from the generating facilities to

a substation near Broadview, Montana, to 500 KV and constructed a second 500 KV line. From the Broadview substation, the Colstrip Owners' 500 KV lines extend westward to a point near Townsend, Montana. At Townsend, the Colstrip Owners' 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV lines. The portion extending from Townsend to the BPA's Garrison substation is referred to as the Montana Intertie, and is extensively discussed in our previous opinion, *Pacific Power & Light Co.* In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 KV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 KV lines providing access to the west.

From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 KV lines. Notably, appellant entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl substation in Oregon. PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D

provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 KV transmission lines connecting Garrison to the Federal 500 KV transmission system first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote in Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accommodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreement, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.

On December 20, 1983, a Montana Power Company representative contacted BPA officials indicating Colstrip Owners had reached an agreement on the allocation of BPA's 330 megawatts. Respectively, PGE was allocated 65 megawatts transmission demand. The reserved amount is reflected in a revised Exhibit D to the PGE's Garrison-West Agreement. In turn, the BPA responded on February 4, 1984, stating:

> This is to confirm that each of your companies [Colstrip Owners] has sent BPA a letter agreeing with the allocation, contained in The Montana

Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.

. . . . . .

Company	Bonneville Contract No.	Transmission Demand
...		
Portland	DE-MS79-81BP00167	65 MW

Once scheduling of Colstrip power over the Hot Springs to border line began, PGE was required to pay BPA a monthly charge calculated pursuant to the terms of the Garrison-West Agreement. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of PGE's actual transmission flow across the lines.

Beginning in the tax year 1985, the Department of Revenue (DOR) imposed taxes upon appellant for its "beneficial use" of the BPA 500 KV transmission lines from Hot Springs to the Idaho border. The assessment was based upon a report submitted by PGE, pursuant to Rule 42.22.107, ARM, stating that it "had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by the Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line" between Townsend-to-Garrison and Hot Springs-to-Idaho border. The other Colstrip Owners did not submit similar reports to the DOR.

The DOR prepared a beneficial use assessment for PGE using the unitary approach. Initially, the DOR assessed PGE's use of the Hot Springs to border lines based upon the capitalized payments made by PGE to the BPA in 1984. However, shortly before trial, depositions revealed such payments represented charges for the use of both 230 and 500 KV lines. Thereafter, the DOR prepared a revised assessment excluding the effect of tax-exempt 230 KV lines.

Appellant presents eight issues on appeal, each of which would invalidate the imposition of the challenged taxes. Three of the issues arise under the United States Constitution, three under the Montana Constitution and two are statutory challenges. However, our decision in *Pacific Power & Light, Co.* forecloses appellant's arguments of the first seven issues. Therefore, our opinion will deal exclusively with appellant's eighth issue contending that a portion of the beneficial use tax assessment was attributable to exempt property.

This case comes to us against a backdrop of extensive technological changes in the electrical transmission industry. *Goldberg v. Sweet*, 109 S.Ct. 582 (1989). As noted in the factual discussion, BPA's entire integrated network is used to schedule power. The power transmitted across electrical lines cannot be accurately identified, and indeed, the path taken is often indirect and bears no relation to contract requisites. Instead, we have only the input point and the eventual withdrawal of energy at a specified location. Between the two, various factors indicate a likely, though not actual, transmission path.

Initially, we discuss our determination that PGE possessed a "beneficial use" within the meaning of the statute. Contrary to appellant's argument, no physical possession, exclusive use or control of the facilities is necessary. Rather, "beneficial use" has long been defined as a right recognized by law and enforceable by the courts.

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127-128, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402; See also *Harrison v. City of Missoula* (1965), 146 Mont. 420, 407 P.2d 703; *Pacific Power & Light, Co.* To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remain under PGE's ownership. Finally, PGE pays for the use of the lines regardless of the actual transmission flow. We find the reservation of firm transmission demand grants PGE an exclusive right taxable under § 15-24-1203, MCA.

The physical wheeling of energy is not specific as to which line it passes through, but rather the energy can travel through various lines as long as the delivery point is where the contract specifies. However, the facts reflect the essential nature of the Hot Springs-Dworshak lines. PGE contracts to transmit bulk transfers of power, necessitating the use of the higher voltage, lower impedance, 500 KV lines. Without the Hot Springs lines, the transfer capability of Colstrip power to the west would be substantially affected. Indeed, BPA officials indicated that it could not fulfill contract obligations absent the Hot Springs lines. Clearly, the Hot Springs lines are a vital portion of the BPA's main grid.

Appellant contends the DOR's assessment erroneously assumed that only 500 KV facilities would be used in providing services, ignoring the fact that a substantial portion of the transmission facilities consist of tax exempt 230 KV lines. PGE argues that in reality, the power is scheduled over the entire BPA transmission system and generally no line or path is associated with a particular power schedule.

The 500 KV lines from Hot Springs to the Idaho border are in the direct transmission path of PGE's bulk energy transfers to its Pearl substation. It is significant to note that no 230 KV lines exist parallel to the 500 KV lines. This fact strengthens the assumption that the 500 KV lines are essential to PGE's energy transfers in this case, and are properly taxed.

It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide the detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. From the total cost, the DOR applied a straight line depreciation to the amount, awarding 13 years depreciation based upon a 35 year life. To the depreciated cost, the DOR multiplied a fraction isolating PGE's interest in the lines, (denominator represents the lines' capacity; and the numerator consists of PGE's firm transmission demand). This value was then integrated into PGE's centralized assessment, and thereby subject to a 40% weighting figure which the DOR ascribes to the cost indicator. *Puget Sound Power and Light Co. v. Department of Revenue* (Mont.1988), 761 P.2d 336, 45 St.Rep. 1078.

A tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace. Likewise, the United States Supreme Court decisions support a tax measured by the value of the tax-exempt property:

> In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold ... In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for [the State] to compute its tax by the value of the property used.

United States v. City of Detroit (1958), 355 U.S. 466, 470, 78 S.Ct. 474, 476, 2 L.Ed.2d 424, 427; *United States v. Boyd* (1964), 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713.

Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and they lines' west to east transmission capacity.

Affirmed.

TURNAGE, C.J., and GULBRANDSON, McDONOUGH, HUNT, SHEEHY and WEBER, JJ., concur.

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

PACIFIC POWER & LIGHT COMPANY, et al.,	)	DOCKET NOS: SPT-1988-4;
	)	SPT-1988-5;
Appellants,	)	SPT-1988-6;
	)	SPT-1988-8;
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,	)	SPT-1988-9;
	)	SPT-1988-11 and
	)	SPT-1989-4
	)	(CONSOLIDATED)
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER and OPPORTUNITY FOR JUDICIAL REVIEW

The above-entitled proceeding having been fully heard and submitted to the State Tax Appeal Board of the State of Montana; the parties having appeared by their respective attorneys; the record of the proceeding, consisting of a transcript of the hearing and all evidence received there, and all pleadings, depositions, and other papers filed by the several parties, having been prepared and the whole thereof duly considered, the following findings are hereby made from the entire record:

STATEMENT OF THE ISSUE

The one remaining issue before the State Tax Appeal Board in these appeals is the propriety of the Department of Revenue's beneficial use tax assessment for the Garrison to Taft 500 kv transmission line system as it has been assessed to the respective contractual users (Pacific Power and Light Company, Portland General Electric

Company, Puget Sound Power and Light Company, and the Washington Water Power Company) for 1986 (tax year 1985). There are no issues of appraisal procedure or methodology or taxable value.

FINDINGS OF FACT

1. The parties were accorded notice of the hearing, in the manner provided for by law.

2. The Board has jurisdiction over the issues in *Pacific Power & Light Co., et al. v. Department of Revenue,* No. SPT-1988-5, pursuant to 15-8-601, MCA.

3. The Department prepared 1986 centralized tax assessments for the operating property of each of the Colstrip owners. The 1986 assessments included beneficial use tax assessments, for the use of the Garrison to Taft 500 kv transmission line system, pursuant to 15-24-1203, MCA.

4. The Department mailed the 1986 beneficial use tax assessments to each of the Colstrip owners on June 19, 1986.

5. On May 27, 1988, the Department advised each of the Colstrip owners that its 1986 Garrison to Taft beneficial use tax assessment was being revised pursuant to 15-8-601, MCA.

6. On June 24, 1988, Mary Whittinghill conducted an assessment review conference with a representative for each of the five Colstrip owners concerning its revised beneficial use tax assessment for the 1986 tax year.

7. On July 1, 1988, Mary Whittinghill advised a representative for each of the Colstrip owners that its bene-

ficial use tax contentions, which had been raised during the assessment review conference, had been denied.

8. On July 14, 1988, the Colstrip owners filed the appeal to the State Tax Appeal Board in SPT-1988-5 concerning the revised 1986 beneficial use tax assessments.

9. The Department's 1986 revised beneficial use tax assessments for the Garrison to Taft portion of the 500 kv transmission line system (to establish the allocation of owners' share of contractual rights) were predicated upon the following elements:

December 1985 plant $184,742,794
BPA Accounting Dept.

	TRANSMISSION DEMAND
Pacific	140,000 kw
PGE	270,000 kw
Puget	466,000 kw
Water Power	393,000 kw
TOTAL	1,915,000 kw

			Market Value
Pacific	7.31%	$13,506,001	$ 6,753,000
PGE	14.10%	$26,047,287	$13,023,643
Puget	24.33%	$44,955,688	$22,477,844
Water Power	20.52%	$37,913,273	$18,956,637
	66.27%	$122,422,248	$61,211,124

10. On April 17, 1981, Pacific entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81B90168.

On April 17, 1981, PGE entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81BP90167.

On April 17, 1981, Puget Power entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-JS79-81BP90169.

On April 17, 1981, Water Power entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81BP90165.

On April 17, 1981, Montana Power Company entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81BP90166.

11. The Colstrip owners' annual reports to the Federal Energy Regulatory Commission for the year ending December 31, 1985, were received into evidence. Those reports reflect that four of the Colstrip owners reported their investment in Colstrip Unit 4 as construction work in progress.

Colstrip owner	Colstrip Unit 4 CWIP
Puget	$247,429,707
PGE	$186,225,337
Water Power	$102,964,950
Pacific	$ 81,575,303

12. PGE submitted an application in order to have its investment in Colstrip Unit 4 classified as new industrial property, pursuant to 15-6-135, MCA. The application sets forth a representation that Colstrip Unit 4 was operational on December 15, 1985.

13. PGE submitted its annual report to the Department on April 2, 1986. The report was submitted pursuant to ARM 42.22.105. The report reflects that PGE did not characterize its investment in Colstrip Unit 4 as construction work in progress. It characterized its investment in Colstrip Unit 4 as plant in service.

14. Montana Power Company sold its 30 percent interest in Colstrip Unit 4 to a group of New York investors on December 30, 1985. Those investors filed an application in order to have their interests in Colstrip Unit 4 classified as new industrial property pursuant to 15-6-135, MCA. The application was submitted on April 29, 1986. The application sets forth a representation that after December 1, 1985, but before December 30, 1985, Colstrip Unit 4 became operational.

15. The Colstrip owners submitted an application in order to have a portion of their property at Colstrip Unit 4 classified as pollution control equipment pursuant to 15-6-135, MCA The application was submitted to the Department of Health and Environmental Services, and it was dated April 9, 1986. The application sets forth a representation that Colstrip Unit 4 was operational before December 30, 1985.

16. Mr. Brush, an engineer for Montana Power Company, testified that there was a major effort to have Colstrip Unit 4 synchronized to the system before the end of December 1985. Mr. Brush defined "synchronized to the system" as connecting a generator to a transmission line system in such a fashion that they operate in a parallel fashion.

17. Mr. Pederson, the Controller of Montana Power Company, testified that the sale/lease-back transaction between MPC and the purchasers of Colstrip Unit 4 was structured so that the purchasers of Colstrip Unit 4 could

obtain the maximum benefits under the federal income tax laws. In order to satisfy the requirements of the Internal Revenue Code, the parties had to demonstrate that Colstrip Unit 4 produced a "substantial amount of power" before the end of December 1985. Mr. Pederson testified that the parties were able to satisfy the Internal Revenue Service that Colstrip Unit 4 produced a "substantial amount of power," and that it was treated as an operating property for purposes of the federal income tax laws on December 31, 1985.

18. Mr. John Nicolay, of the Burlington Northern Railroad Company, was deposed. He testified that he had served as the Bureau Chief of the Inter-County Property Bureau of the Department until 1986.

Mr. Nicolay testified that he was approached by Keith Kovash concerning the tax treatment of Colstrip Unit 4 for the 1986 tax year. He testified that Mr. Kovash had represented that Colstrip Unit 4 would become commercially operational shortly after the first of the year in 1986. Mr. Nicolay also testified that the Colstrip owners had advised him that Colstrip Unit 4 was operational during year-end 1985, and that it was producing test power. Mr. Nicolay also testified that the Colstrip owners had requested that he treat Colstrip Unit 4 as "plant in service" for the 1986 tax year, just as he had treated Colstrip Unit 3 as plant in service for the 1984 tax year. Mr. Nicolay also testified that the Colstrip owners had represented to him that Colstrip Unit 4 would be "closed to plant" or "closed to books" shortly after the first of the year in 1986.

19. The Board finds that Mr. Nicolay had knowledge of the applications identified in Findings of Fact 12, 14, and 15. According to Mr. Kovash, Mr. Nicolay and the Department were led to believe by the Colstrip owners that Colstrip Unit 4 was operational during year-end 1985. The

Board also finds that Mr. Nicolay and the Department were led to believe by the Colstrip owners that Colstrip Unit 4 would become *commercially* operational shortly after the first of the year in 1986.

20. The Board finds that the Department treated the four Colstrip owners' investment in Colstrip Unit 4 as plant in service, as a result of the factual representations set forth in Findings of Fact 18 and 19.

21. The mathematical effect of treating the four Colstrip owners' investments in Colstrip Unit 4 as plant in service rather than as CWIP is reflected in Exhibit 110. That exhibit reflects that those four Colstrip owners' 1986 ad valorem tax assessments were reduced by $77,277,083.

22. Mary Whittinghill described the original 1986 beneficial use tax assessment methodology. She testified that the Department relied upon the audited cost figure of the 500 kv transmission line system which was submitted by Bonneville Power Administration. She testified that the Department established a mathematical ratio in order to allocate the cost to each of the Colstrip owners, as a measure of their beneficial use interest in the 500 kv system. The ratio was computed by dividing each Colstrip owner's respective transmission demand under Exhibit D to its Garrison West Agreement by 1,915 megawatts. (the capacity of the transmission line system from Garrison to Taft). The Department multiplied the cost times the resulting ratio. The transmission demands which were extracted from the Garrison West Agreements, were the fully stepped-up transmission demands after Colstrip Unit 4 became commercially operational.

23. The Department added the allocated cost, as described in Finding of Fact 22, to the unit method of appraisal for each Colstrip owner, after the Montana Value had been determined.

24. None of the Colstrip owners appealed its original 1986 beneficial use tax assessment to this Board.

25. The Colstrip owners' Garrison West Agreements with Bonneville reflected that they enjoyed the following transmission demands, once Colstrip Unit 4 became commercially operational.

> Effective at 2400 hours on the later of (1) the date of commercial operation of Colstrip Unit 4 or (2) the date when a 500 kV transmission line, connecting Garrison to the Federal 500 kV Main transmission System at or west of Hot Springs, first becomes available for scheduling power, for the remainder of the term of this contract:

Colstrip owner	Contract No.	Transmission Demand
Puget	DE-MS79-81BP90169	466,000 KW
PGE	DE-MS79-81BP90167	270,000 KW
Water Power	DE-MS79-81BP90165	393,000 KW
Pacific	DE-MS79-81BP90168	140,000 KW
	TOTAL	1,269,000 KW

26. The Department did not treat Colstrip Unit 4 as construction work in progress in the 1986 ad valorem tax assessments, as a result of the representation of material facts by the Colstrip owners, as set forth above in Findings of Fact 12, 13, 14, 15, and 18.

27. But for the representation of material facts by the Colstrip owners concerning Colstrip Unit 4, the Department would have treated that property as construction work in progress in the 1986 ad valorem tax assessments.

28. The beneficial-use tax statute, 15-24-1203, MCA, is a privilege tax statute. Accordingly, the Department imposes beneficial-use taxes upon the taxpayer only if the taxpayer "beneficially used" otherwise tax-exempt facilities prior to the annual assessment date. Under Montana statutes, the assessment is midnight of January 1 (December 31) next preceding. 15-8-201, MCA.

29. In its 1983 session, the Montana Legislature amended 15-24-1203, MCA, in order to impose taxes upon "users" of federal electric power transmission facilities of 500 kV and higher. Appellants' electric utility property is centrally assessed by the Department.

30. The U.S. government, acting through the Bonneville Power Administration ("BPA"), owns, maintains, and operates "main grid" transmission facilities (i.e., 230-kilovolt ("kV") and 500-kV electric transmission facilities) in the "Pacific Northwest," which encompasses Oregon, Washington, Idaho, and Western Montana, as well as portions of Nevada, Utah, and Wyoming. 16 U.S.C. Section 838 (1982) (Pacific Northwest Federal Transmission System Act); 16 U.S.C. Section 839 (1982) (Pacific Northwest Electric Power Planning and Conservation Act).

31. Each of the Appellants has a separate contract with BPA for transmission services out of the Garrison Substation over BPA's main grid, which contracts are referred to as the "Garrison-West Contracts." Exhibit A-3 (Pacific); Exhibit A-6 (PGE); Exhibit A-5 (Puget Sound); Exhibit A-7 (Water Power); Exhibit A-2 (MPC).

32. The Department imposed beneficial-use taxes on all five Appellants for tax year 1984 on account of their beneficial use of the Townsend-Garrison federal 500-kV transmission facilities as of midnight, December 31, 1983. Appellants challenged this imposition on constitutional

grounds in Lewis and Clark County District court, which upheld the assessments. The Montana Supreme Court upheld the imposition of such beneficial-use taxes on the grounds that the Appellants' contract with BPA (Exhibit A-1) entitled them to firm transmission demands over the transmission lines as of the assessment date. Specifically, the Montana Supreme Court stated,

> In the present case, the Colstrip Owners *have an enforceable contract interest* which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. (773 P.2d 1181)

CONCLUSION

> The Owners *enjoyed a beneficial use interest* in the Montana Intertie Agreement 500 kV lines, which use we hold was properly taxable under Section 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines. (773 P.2d 1184)

33. In tax year 1985 the Department imposed beneficial-use taxes on PGE on account of PGE's alleged beneficial use of federal 500 kV transmission facilities between Hot Springs and the Idaho border as of midnight, December 31, 1984. PGE challenged those taxes in Lewis and Clark County District Court, which upheld the assessments. Again the Montana Supreme Court upheld their imposition because the Court determined that PGE had reserved transmission demands in the subject transmission facilities. The Court stated,

> To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an

> enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remains under PGE's ownership. *Finally, PGE pays for the use of the lines regardless of the actual transmission flow.* We find the reservation firm transmission demand grants PGE an exclusive right taxable under Section 15-24-1203, MCA.

Portland General Electric Co. v. Department of Revenue, 773 P.2d 1189, 1193 (Mont. 1989). The Court concluded:

> Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. *The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual (power) flows and the lines' west to east transmission capacity.*
>
> *Affirmed.*

34. The Garrison-Taft transmission facilities first became operational in November 1985, although those facilities did not become available for full, firm scheduling of Appellants' power west of Garrison until 2400 hours on January 23, 1986. BPA's March 17, 1986 power bill to Pacific provides:

> On January 23, 1986, @ 2400, Garrison-Taft was deemed ready for firm scheduling purposes, therefore the full transmission demands under the Garrison-West" (sic) wheeling agreement are to be billed effective then.

35. As of the assessment date for the 1986 tax year (midnight December 31, 1985), according to the Garrison-West Contracts then in effect, BPA was obliged to provide 330 MW of firm transmission services over its main grid

facilities west of Garrison, divided as follows: Pacific--32 MW (Def. Ex. 21, Rev. 1 to Ex. D, p. 2 of 10); PGE--65 MW (Def. Ex. 22, Rev. 1 to Ex. D, p. 1 of 4); Puget Sound--36 MW (Def. Ex. 23, Rev. 3 to Ex. D, p. 1 of 5); Water Power--197 MW (Def. Ex. 24, Rev. 2 to Ex. D, p. 1 of 3). However, the Garrison-Taft facilities had been in operation (although not deemed available for full, firm scheduling power) for two months in 1985. The Department assessed beneficial-use taxes on Pacific, PGE, Puget Sound, and Water Power.

36. As Chairman Rothwell pointed out, whether power produced is "test" or "commercial" power, it all sells the same:

> So, it wouldn't matter if you were (in) a test mode on the generators or the line or under full operation, it all sells the same, if it got down (to) the other end?
>
> MR. BRUSH: To the customer that it's going to, it would appear the same. (Tr. page 330)

37. The Department has treated generating plants--both Colstrip Unit 3 and Colstrip Unit 4--as "plant in service" as of the moment each commenced producing electricity. This is because, as Mr. Brush conceded in response to a question from Board Chairman Rothwell, all power produced at a generating plant is ultimately sold. Accordingly, the Appellants' income, and consequently the income approach, was affected *at the very moment that Colstrip Unit 3 or 4 commenced producing power.* Moreover, as Ms. Whittinghill testified on cross-examination, the stock-and-debt indicator *already* completely reflects the value of a plant that is producing power in a test mode.

38. Colstrip Unit #4 was a plant in operation in 1985. It produced and sold power starting:

a) Sept. 15, 1985: Mr. Brush;

b) October 1985; Owners, Exh. 203;

c) December 30, 1985; Owners, Exh. 194:

d) December 15, 1985; PGE, new industry application to the state;

e) Dec. 1 to Dec. 30, 1985: MPC, sale and leaseback agreement, claimed Colstrip Unit #4 operational;

f) Before December 15, 1985; Mr. Pederson, MPC deposition.

All these dates asserted above precede the effective date for classification for ad valorem tax purposes of midnight next preceding January 1, 1986.

The Department classed Colstrip Unit #4 as "plant in service" for 1985 (even though it felt it was CWIP for most, if not all, of that year.)

39. The Colstrip owners, under the terms under the terms of the Garrison-West Agreement (each having a separate contract with the BPA) were required to pay Intertie charges for the use of those lines as early as October 1983 even before power was available from Colstrip Unit #3. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of the actual transmission flow across the lines (See 773 P. 2d 1192-93).

The owners were paying for the reserved transmission capacity, a specific contractual right. The same right was

initiated when the lines were tied through for Garrison-West. No other parties could use the lines; the owners reserved more than the lines' capacity.

For Colstrip Unit #4, power was produced in 1985; 89,079 megawatt hours (under transmission for others) was noted in Exh. 5, p.401A.

On December 31, 1985 alone, Colstrip #4 produced 561 megawatt hours at 0100 hours; that is 80% of capacity and about the same amount as was produced on January 23, 1986 when owners (engineers) declared the lines available for scheduling.

40. Since the full amount of Colstrip Units #3 and #4 power could not be scheduled on a firm basis west of Garrison, the Colstrip owners entered into an interim transmission agreement. Its purpose was to make available most of the scheduling capacity west of the Garrison substation in order to ensure the transmission of Colstrip power through Garrison West.

Each Colstrip owner's Garrison West Agreement provided that test energy from Colstrip Units 3 and 4 would be delivered west of Garrison, pursuant to a non-firm transmission rate.

> "4. Test power from either Colstrip Unit No. 3 or No. 4 which may be made available for wheeling over the Federal System prior to their respective commercial operation dates shall be wheeled at the rate schedule contained in Exhibit F to the extent that the Company's Project Scheduled Power exceeds the applicable Transmission demand." (Puget Power Garrison West Agreement, Exhibit D, Pg. 2 of 5, Footnote 4, Exhibit 23.)

41. Mr. Brush (correcting his deposition answer) states:

> Okay, prior to Garrison-Taft being energized before the Nov. 4 and Nov. 5 dates, the four Colstrip participants (excluding the MPCo.) did have firm transmission rights under the, their Garrison-West contracts and those were laid out in the revision to those contracts in Exhibit D. (Tr. page 174)

42. Mr. Anasis:

> It (Garrison West #1 and #2) was released for commercial operation, for system operation on the dates I noted (Nov. 4 and 5, 1985)
>
> Q: What do they do with it when it's released?
>
> A: Well, at that point it's been declared that it's available for service, commercial service, and now we can officially schedule power across it and we can take it into account in our studies and so forth and develop transfer limits based on having that thing in service. . . and just basically use it as part of the operating power system. (Anasis deposition, pages 141-142, Exhibit 99)

43. Mr. Brush admitted that the lines (Garrison-West 1 and 2) were carrying power the last two months of 1985. In a memo he stated that Colstrip Unit #4 power was going to flow on the Garrison-Taft lines (Exhibit 190, page 19). "The power actually flowed in that line when it was tied through back in Nov. 4 or 5 of 1985." (Tr., page 328)

"The power you're moving across several transmission lines, or are parallel, will divide up based on the various

impedances of the lines," and the 500 kv lines has the least impedance to the flow of that power. (Tr., page 329)

44. Shortly after the Garrison-Taft lines were completed, Mr. Brush sent a memo to his system schedulers (Nov. 15, 1985) indicating that the net scheduling capacity with the west was increased from 800 mw to 1,000 mw. (Tr., page 320; also Brush deposition, Exhibits 11 and 189)

From Nov. 15, 1985 to Dec. 31, 1985, the increased non-firm capacity was schedule and billed according to the owners' Garrison-West contracts (Ex. F rate schedule). Non-firm power is "billed on a main grid basis for BPA which includes both 500 kv and 230 kv and depends on how far they have to move the power across their system to determine the charge. So I really couldn't say if it was going across the 500 kv lines or the 230 kv (in 1985). As soon as the Garrison-Taft 500 kv was tied through, Colstrip owner would have flowed across it." (Tr., page 627)

45. Mr. Brush was examined concerning a memorandum that he prepared on November 15, 1985.

> "Q. This seems to suggest that Garrison to Taft has been added to the system, doesn't it?
>
> A. It shows that its been energized and it's tied through. It doesn't say it's commercial.
>
> Q. Does this suggest that that increased the power transfer capability west of the Garrison Substation?
>
> A. Yes it did.
>
> . . .

Q. So there was an ability to schedule more power, including Colstrip power, after the Garrison-Taft lines were energized for that purpose?

A. Yes, there is.

Q. So that situation existed from November 15th, '85, through the end of the year, 1985?

A. I believe so.

. . .

Q. And so when you are suggesting more power capacity west of Garrison, are you suggesting that that is essentially non firm capacity?

A. That's correct.

Q. How was that non firm capacity billed to the Colstrip owners during the interim period, from November 15th, '85 to December 31, '85?

A. I would assume it would be billed under the non firm rate that's spelled out in the Colstrip participants' Garrison-West contracts." (Brush deposition, pages 58-60, Exh. 190).

46. The Department has determined that the reserve transmission demand in favor of each Colstrip owner pursuant to the agreements which they have with the BPA must be *the measure of the beneficial use tax interests.* (Tr., page 345).

The "full transmission demands" of owners (as employed by the Department and as referred to by the Montana Supreme Court) were used for the *purpose of allocating the beneficial use tax cost between the users.* Their taxable interests are reflected in the shares assigned with full, firm usage.

47. Robert G. Strong (Property Tax Supervisor, PP & L Co., in a March 28, 1986 letter to John Nicolay of the Department of Revenue) acknowledged: "The charges assessed against Pacific by Bonneville for bulk transfer services (1985) on the Bonneville power line were . . . $1,504,710 for the Townsend-Garrison segment and $574,745 for the Garrison-Taft segment." (Tr., page 637, also Book 2, Tab 3).

Edward P. Miska (PGE Co., in a March 31, 1986 letter to John Nicolay) stated: "Since the physical wheeling of energy is not specific as to which lines the energy transmits over, but rather the energy can be traveling over various lines as long as the final end result of delivery point is to where our contracts specify, PGE cannot proportion the exact service charges for the transmission lines in the State of Montana." (Exhibit 13).

48. The Department revised the 1986 and 1987 beneficial use assessments for the Colstrip owners. The revised assessments involved three segments of the transmission line system. Those segments included: the Townsend to Garrison segment (the Montana Intertie), the Garrison to Taft 500 kv system, and the Hot Springs to Idaho Border 500 kv facilities. The May 1988 revisions to the beneficial use assessments for 1986 and 1987 did have an effect on the Colstrip owners. The Townsend to Garrison beneficial use assessments were reduced for 1986 and 1987. The Colstrip owners received tax refunds from Powell, Broadwater and Jefferson Counties. The 1987 Garrison to

Taft beneficial use assessment changed slightly. (Exhibit 110).

49. The Colstrip owners did not produce any evidence that the Department's valuation methodology was erroneous. The Department moved for a summary ruling as a result of the failure of proof.

> "They have contention here on the revised assessment for 1986 for Garrison to Taft only. For the 1988 year, you have five consolidated appeals before you involving all three segments of the 500 kv transmission line system. You haven't a shred of proof on any of those issues, any methodology issue, anything in the 1988 appeals, not one shred of proof. In the 1989 tax appeal, you have a consolidated or joint appeal by the five Colstrip owners under docket number SPT-1989-4, again, there hasn't been any shred of proof about any methodological claim for anything on behalf of the Colstrip owners. They've rested their case at this point. *So I think the Board is in a position where it can issue a summary ruling at this point affirming the beneficial use taxes that have been posed upon the Colstrip owners for all of those segments of the line for all of those years because the Colstrip owners didn't put on any case.* They had no proof and at this point the Department is entitled to prevail.
>
> . . .
>
> MR. ROTHWELL: Yeah, these other two issues. I guess that's true. You have no argument with that acknowledgement?
>
> MR. NELSON: No, that's right.

MR. ROTHWELL: Alright, so we'll grant your motion on these two issues." Tr. pages 352-353, 356).

Since the State Tax Appeal Board granted a summary ruling in favor of the Department as to all other issues and claims in the consolidated appeals, the 1986, 1987, 1988, and 1989 beneficial use assessments were affirmed for all segments of the transmission line system in Montana, except for the Garrison to Taft portion in 1986.

50. The Board specifically rejects all proposed findings of fact not specifically adopted.

SUMMARY OF ARGUMENT

No evidence was presented to substantiate the assertion or belief that "beneficial use" only begins when: (a) full and firm scheduling begins; or (b) when the BPA or an engineer declares lines to be "commercially operational"; or (c) when CWIP ends as reported to FERC by the owners. Nothing in the Administrative Rules of Montana or the Montana Codes Annotated speaks to the initiation or triggering of the beneficial use privilege tax; these discuss the circumstances that warrant its application, i.e., usage plus contractual rights to that service.

A facility (generating plant or transmission lines), may be deemed to be in service for tax purposes and still not yet in commercial operation for contractual purposes; the power of the State of Montana to tax cannot be precluded by contractual arrangements between private parties.

Each owner's Garrison-West agreement provided that test power from Colstrip Units 3 and 4 would be delivered west of Garrison on a non-firm transmission rate. The owners' contracts with BPA take up all capacity not reserved to BPA. Once the Garrison-West lines were tied

through, those rights, whether implemented or not, whether effected episodically or continuously, are rights subject to tax.

Beneficial use is reflected in the right to firm, full transmission demands as noted by the Appellants. It is also reflected in occasional, sporadic transmission of non-firm quantities at a lower price. "Privilege" use is a property right; the owners had contractual rights to less than full demands.

The taxpayers' declaration, whether made by an engineer or a company officer, that "commercial operation" has begun establishes only the date when full and firm transmission demands shall begin. It does not establish the date for initiation of the beneficial use tax. Neither the price paid, nor the proportion of the capacity actually used, nor the fact that the transmissions are not continuous alter the fact that a beneficial use has been realized. That is not annulled merely by noting that full, firm transmission rights have not yet been realized.

In order to get "plant in service" acceptance from the IRS (for lower tax treatment), MPC successfully demonstrated that the plant was generating significant amounts of power prior to December 31, 1985. Absent the transmission capacity of Garrison-West lines #1 and #2, Colstrip Units #1 through #4 could not realistically operate simultaneously, as they did.

The owners pay for the use of the lines regardless of the actual transmission flow. The beneficial use tax is imposed on the privilege of using property, a right which began when the lines (Garrison-West #1 and #2) were "tied through."

The Department and the Montana Supreme Court do not say that less than full transmission use constitutes "no

use." There would be little point for the parties to agree to a price schedule for limited or sporadic transmission of power if in fact there was no usage except what is full and firm. The amount of that use may be in question but the fact of use is not.

The Garrison-West lines were constructed for the purpose of transmitting the owners' electrical power (and a slightly greater transmission capacity for BPA's power).

The owners' contracts gave me an enforceable interest in the injection and removal of power subject only to BPA's ability to transmit those amounts.

There are no other eligible users with a demonstrated need for transmission capability on the Garrison-West 500 kv lines.

The owners are liable for the total annual cost of the lines should there be no transmission of non-firm or BPA power, even if they do not use the lines.

The relationship between the construction/ completion of Colstrip Unit #4 and the availability of Garrison-West transmission lines #1 and #2 was extensively detailed by the respective parties, as indicated by the record, and thoroughly analyzed by the Board.

The Board was not persuaded that any of the sequential events concerning Colstrip Unit #4 (turbine roll, test operation, engineers' declarations of "plant in service", "plant in operation" "commercial operation", or full and firm power transmission), whether contractual or observational, had any causal relationship to the timing of beneficial use taxation on Garrison-West lines #1 and #2.

The date of initial beneficial use of Garrison-West lines #1 and #2 by the owners, although perhaps

incapable of precise determination was clearly and obviously at some time after Nov. 4 1985 and before midnight Dec. 31, 1985.

The owners have contractual rights to transmission demands; beneficial use began when the first line was tied through. The precise date is not important. The beneficial use was obtained from lines #1 and #2 when power began to flow through from any of the units at Colstrip (in which the owners had an enforceable contract.)

The Department, the Appellants and the Montana Supreme Court all agree that power flowed over lines #1 and #2 after the lines were tied through in November 1985.

As a result the owners are to be taxed for beneficial use for 1985 (the full year) even though power was distributed over the lines for only part of the year.

CONCLUSIONS OF LAW

1. The Colstrip owners properly invoked the jurisdiction of this Board concerning the revised 1986 Garrison to Taft beneficial use assessments, pursuant to 15-8-601, MCA.

2. The beneficial use tax was properly imposed on the utility owners' privilege of using federal transmission system (BPA) property that would otherwise be tax exempt. MCA 15-24-1203.

ORDER

The 1986 revised beneficial use tax assessments for the Garrison to Taft 500 kv facilities are hereby affirmed in all respects.

DATED this 30th day of August, 1990.

BY ORDER OF THE
STATE TAX APPEAL BOARD

s/ John J. McNaught
JOHN J. MCNAUGHT, Chairman

(SEAL)

s/ Patrick E. McKelvey
PATRICK E. McKELVEY, Member

s/ Norman E. Taylor
NORMAN E. TAYLOR, Member

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

(3)

No. 90-1738

In The

Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

vs.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION

PAUL VAN TRICHT*
Special Assistant Attorney General
Office of Legal Affairs
Department of Revenue of The State of Montana
Mitchell Building
Helena, Montana 59620
(406) 444-3341

Attorney for Respondent, Department of Revenue of the State of Montana

*Counsel of Record

June, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Does Montana's tax of the Petitioners' private, for profit use of electrical transmission lines owned by a federal agency, violate the Supremacy Clause, the Commerce Clause, or the Fourteenth Amendment when:

1. Montana taxes similarly situated users of state-owned property and federal-owned property in the same manner, e.g., it exempts both the private users of state-owned railroad rights-of-way and the private users of federal-owned railroad rights-of-way from beneficial-use taxes?

2. The Petitioners pay less beneficial-use taxes on the lines they use than they would if they owned such lines outright?

3. The Petitioners have the firm contractual right to use the power lines to the exclusion of all others for the entire life of those power lines?

4. The Petitioners are assessed based on the value of this firm contractual right?

5. Two of the Petitioners are the largest electrical utilities in Montana and sell the power transmitted over the lines to Montanans?

6. There is no expressed or implied act of Congress which preempts Montana's right, as recognized by this Court, to tax the private for profit use of federal property?

LIST OF PARTIES AND RULE 28-2.1 STATEMENT

The undersigned, counsel of record for Montana Department of Revenue, certifies that the following parties have an interest in the outcome of this case as Respondents:

State of Montana
Jefferson County Government, Jefferson County, Montana
Broadwater County Government, Broadwater County, Montana
Powell County Government, Powell County, Montana
Granite County Government, Granite County, Montana
Mineral County Government, Mineral County, Montana
Missoula County Government, Missoula County, Montana
Sanders County Government, Sanders County, Montana
Montana University System
Montana Office of Public Instruction

The parties having an interest in the outcome of this case as Petitioners are:

Pacific Power & Light Company
Portland General Electric Company
Puget Sound Power & Light Company
The Washington Water Power Company
The Montana Power Company

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 28-2.1 STATEMENT ... ii

TABLE OF CASES AND AUTHORITIES..... iii

OPINIONS BELOW..... 1

STATEMENT OF THE CASE..... 3

REASONS WHY THE PETITION SHOULD BE DENIED 5

Summary of Argument 5

A. The Montana Beneficial Use Tax is Constitutional 6

B. The Montana Beneficial Use Tax Does Not Discriminate Against Those Who Contract With the Federal Government or Against Interstate Commerce..... 10

C. Montana Assessment Methods Do Not Present a Constitutional Question..... 16

D. Congress Has Not Preempted Montana's Taxation of The Petitioners' Beneficial Use of BPA Transmission Lines 18

CONCLUSION 20

TABLE OF CASES AND AUTHORITIES

Page

CASES

Central Montana Railroad v. Department of Revenue, SPT-1988-13, March 20, 1990 13

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 13

Fay v. People of State of New York, 332 U.S. 261 (1947) 4

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) ..9, 12

Mullaney v. Andeson, 342 U.S. 415 (1952) 4

Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940) 12

New York Times Co. v. Jascalevich, 439 U.S. 1316 (1978) 6

Offutt Housing Co. v. County of Sarpy, 351 U.S. 466 (1958) 17

Pacific Power & Light Co. v. Montana Dept. of Revenue, 773 P.2d 1176 (Mont. 1991) 1

Pacific Power & Light Co. v. Dept. of Revenue, CDV-91-133, Montana First Jud. Dist., Lewis & Clark County 16

Pacific Power & Light Co. v. Montana Dept. of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989), cert. denied, 110 S.Ct. 853 (1990) 1

Pacific Power & Light Co. v. Dept. of Revenue, SPT-1988-4 through SPT-1988-11 and SPT-1989-4, August 30, 1990 16

Phillips Chemical Co. v. Dumas School District, 361 U.S. 376 (1960) 13

TABLE OF CASES AND AUTHORITIES – Continued

Page

Portland Gen. Elec. v. Montana Dept. of Revenue, 237 Mont. 324, 773 P.2d 1189 (1989), cert. denied, 110 S. Ct. 853 (1990) 1

Puget Sound Power & Light Co. v. Dept. of Revenue, 761 P.2d 336 (Mont. 1988) 18

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 20

United States v. Boyd, 378 U.S. 39 (1964) 9

United States v. City of Detroit, 355 U.S. 466 (1958) 18

United States v. City of Manassas, 830 F.2d 530 (4th Cir. 1987), aff'd 108 S. Ct. 1568 (1988) 13

United States v. County of Fresno, 429 U.S. 429 (1977) 9, 10

United States v. Johnson, 268 U.S. 220 (1925) 13

United States v. Maxwell Land-Grant Co., 122 U.S. 365 (1887) 4

United States v. New Mexico, 455 U.S. 720 (1982) 9

Weinberger v. Salfi, 422 U.S. 749 (1975) 15

CONSTITUTIONAL PROVISIONS

Article VII, section 7, 1972 Montana Constitution 3

STATUTES AND RULES

15 USC § 391 ..... 6, 18

16 USC § 839 19

§ 15-8-111, MCA (1989) 17

§ 15-23-101, MCA (1989) 7

§ 15-24-1203, MCA (1989) 5, 7

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

On May 21, 1991, pursuant to Rule 30, the Clerk of this Court extended the time within which the Respondents had to file this brief in opposition through June 21, 1991.

The Respondents, the Department of Revenue of the State of Montana, seven Montana counties, their respective Treasurers, and the Montana State Superintendent of Public Instruction, respectfully request this Court deny the petition for a writ of certiorari to the Montana Supreme Court to review its decision in *Pacific Power & Light Co., et al. v. Montana Dept of Revenue, et al.*, ___ Mont. ___, 773 P.2d 1176 (1991) (*"Pacific II"*).

OPINIONS BELOW

This is the third time the Petitioners have presented the same facts and issues to this Court. The two prior cases were *Pacific Power & Light Co. v. Montana Dept. of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990), Pet. App. A58 (*"Pacific I"*), and *Portland Gen. Elec. v. Montana Dept. of Revenue*, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990), Pet. App. A83 (*"PGE"*). All the issues properly raised in this case were raised in those prior Petitions. This case does not raise any new issues or facts.

The first issue which the Petitioners claim is new, "that the state's exemption of its own property from beneficial use taxation violated the prohibition against

states' discriminating against the federal government or those with whom it deals", was raised by the Petitioners as issue no. 3 in *Pacific I* and no. 4 in *PGE*.

The second and third "new" issues, Petitioners' claims that Montana's assessment method is discriminatory, are not ripe for consideration by this Court. They are not ripe because the Montana courts did not address those issues. The Montana courts did not address them because the Petitioners have not exhausted their pending administrative remedies.

Petitioners' statement of the issues in *Pacific I* are reprinted at Resp. App. A2. Petitioners' statement of the issues in *PGE* are reprinted at Resp. App. A4-5.

In *PGE* this Court asked the Solicitor General to express the views of the United States. The Solicitor General's brief is reprinted at Resp. App. A6-25. In that brief the Solicitor General asked this Court to deny the *Pacific I* and *PGE* petitions.

Prior to trial the District Court made several rulings which are critical to this Petition. Those decisions show that the Petitioners' contest of the assessment method (the second and third "new" issues) are not ripe for review by this Court. The issues are not ripe because these rulings did not allow the Petitioners to raise these issues in this case. The decisions are: an Order denying Petitioners' Motions to Amend Their Complaints, Resp. App. A26; an Order Granting Defendants Motion for Summary Judgment, Resp. App. A28; an Order Re Plaintiffs' Motion for Stay; Resp. App. A32; and a Pretrial Order, Resp. App. A35.

STATEMENT OF THE CASE

A. The Facts.

The facts will be discussed in the argument. The facts for these cases also were concisely and objectively set out by the Solicitor General in his *PGE* brief. Resp. App. A9-14. The Montana Supreme Court in *Pacific I* Pet. App. A59-61, *PGE*, Pet. App. A84-88 and *Pacific II*, Pet. App. A11-14. The facts in *Pacific I* and *PGE* are the same as the facts in this case.

B. The Proceedings in State District Court.

Before the District Court the Petitioners tried to amend their complaints to include attacks on the method used to assess the tax. The District Court denied the amendments because, under Montana law, the assessment method first must be presented to the Montana State Tax Appeal Board (STAB) before review by the District Court.[1] Resp. App. A27. Indeed, those issues were addressed by the Montana State Tax Appeal Board in a recent decision which is currently on appeal to the Montana District Court. That decision is Pet. App. A92-114.

The District Court dismissed the Petitioners' case on the remaining issues for lack of proof.[2]

---

[1] STAB is a three member, independent quasi-judicial body appointed by the Governor and confirmed by the Montana Senate for fixed terms. It was created by Art. VII, § 7 1972 Montana Constitution. STAB has specific expertise in property valuations and assessment methods.

[2] "Thus, due to lack of evidence proving Plaintiffs' claims . . . this Court finds that Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes . . . violates any statutory or constitutional rights." Pet. App. A56-57.

C. The Montana Supreme Court Decision.

Before the Montana Supreme Court the Petitioners argued their case based upon the trial record. The Montana Supreme Court affirmed the District Court stating: "The District Court held that the [Petitioners] had not sustained the burden of proving that the assessment of the beneficial use taxes had violated any statutory or constitutional rights. We affirm."[3] Pet. App. A12.

The Petitioners failed to prove their case. This is demonstrated by their Petition for Rehearing when they attempted to submit affidavits to prove new "facts." Pet. App. A21-46.

The Montana Supreme Court gave this case a complete review based on the record developed by the Petitioners at trial.[4]

---

[3] The party attacking the statute has the burden of establishing the invalidating facts on which the claim is based. See, e.g., *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Fay v. People of State of New York*, 332 U.S. 261 (1947).

[4] State or federal appellate courts are not trial courts. They are not in the position to retry a case. Courts have uniformly rejected Petitions for Rehearing based on matters outside the record. See, e.g., *United States v. Maxwell Land-Grant Co.*, 122 U.S. 365 (1887). After failing to develop a record on this issue, the Petitioners cannot complain that the Montana Supreme court erred because it relied upon the only record properly before it.

REASONS WHY THE PETITION SHOULD BE DENIED

Summary of Argument

The Montana Supreme Court decisions in *Pacific I*, *Pacific II*, and *PGE* do not conflict with any opinion of this Court, federal circuit court of appeals, federal district courts, or the highest courts of any other state. The law on the issues presented by the Petitioners is settled. The Montana Supreme Court applied established law to the facts in this case.

As the Solicitor General stated in his *PGE* amicus brief, "[b]ecause the Montana Supreme Court's decision rests on highly specific factual grounds and does not appear to present an issue of recurring significance, we [the United States] do not believe that review by this Court is warranted." Resp. App. A14. The basic facts and issues have not changed from those presented in *Pacific I* and *PGE*.

This Court has repeatedly held that a State may tax the private use of property owned by the United States. The Montana beneficial use tax, § 15-24-1203, MCA, is just such a tax. Under that law, Montana taxes the Petitioners' firm, long term, exclusive, contractual right to use power lines owned by the Bonneville Power Administration (BPA). They use these lines to transmit their power for their own commercial profit-making activities. This tax does not discriminate against the United States or those with whom it deals. The United States does not directly or indirectly pay the tax.

Montana's tax does not discriminate because it is imposed upon similarly situated users of all types of tax exempt property including property owned by state and

local governments and churches. The five Petitioners include the two largest providers of electric power in Montana. The power that flows across the BPA lines is used by Montanans and non-Montanans. The ultimate economic burden of this tax falls equally on Montanans and non-Montanans; therefore, the tax does not violate the commerce clause or 15 U.S.C. § 391 ("Anti-Discrimination Act"). No act of Congress expressly or implicitly preempts Montana's taxation of the Petitioners' beneficial use of the BPA's transmission lines.

The Petitioners' challenge to the method used to calculate their taxes is not ripe for review because the Montana courts declined to hear that issue. *New York Times Co. v. Jascalevich,* 439 U.S. 1316 (1978). The Montana courts deferred instead to the pending case before STAB. That STAB case is now on review in the Montana judicial system. The method for assessing the Petitioners was not fully developed before the District Court in this case because of its procedural rulings. The record is simply too incomplete for a constitutional review of such a complex factual issue as property tax assessment methods. Indeed, a fully developed record would show that the Petitioners are paying less tax proportionately than other taxpayers in Montana.

A. The Montana Beneficial Use Tax is Constitutional.

As the Solicitor General noted this is a unique situation and a unique case. This is a case with little national impact because it is so unique.

Montana imposes ad valorem property taxes on property owned by individuals and corporations. This property tax applies to utilities; it specifically includes "electric power or transmission lines." § 15-23-101(2), MCA (1989). Montana also imposes a general beneficial use tax on private users of tax-exempt property. The tax is on the "possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation." § 15-24-1203, MCA (1989). This is the statute in controversy. This law, with the most recent amendments which retroactively apply to the years in controversy, is reprinted at Resp. App. A41-42.

The basic facts omitted by the Petitioners are set out by the Montana Supreme Court in *Pacific I* and *PGE*. In the 1970's the Petitioners needed 500 kilovolt transmission lines to transmit electricity from coal fired generating plants in eastern Montana to electrical consumers in western Montana and the west coast. Pet. App. A59. They constructed a 150 mile transmission line from these plants to a point just south of Townsend, Montana. *Ibid.*

At the Petitioners' request, the BPA built the remaining portion of the line from Townsend to the Idaho border. This 500 kilovolt line was designed to transmit the Petitioners' private electricity. It is one continuous line with no substation or other break where ownership changes from the Petitioners to the BPA. Id. at A60. Because the BPA is a federal agency, the BPA's portion of

this transmission line is exempt from Montana's ad valorem property tax.[5]

The Petitioners entered into long-term contracts with the BPA. Those contracts guarantee them the "firm contractual right" to transmit power over the BPA lines for the entire economic life of those lines. Pet. App. A85. "[T]he power flowing through the lines remain[s] under [petitioner's] ownership" and the Petitioners "pay for the use of the lines regardless of the actual transmission flow." Pet App. A89. "[T]he reservation of firm transmission demands grants [the Petitioners] an exclusive right" to use of the lines. Pet. App. A89. Clearly, the Petitioners beneficially use the lines; they possess and control the facilities sufficiently to submit them to taxation on that use. Pet. App. A64-65. Under the contracts, the BPA will recover all the direct and indirect costs of building and operating the transmission lines. Pet. App. A65. The BPA does not directly or indirectly pay the tax. Pet. App. A76.

The law on the taxation of the beneficial use of federal property was succinctly stated in the Solicitor General's *PGE* amicus brief:

> Under settled principles of intergovernmental immunity, it is well established that, in the absence of congressional consent, a State cannot impose a tax directly on the United States (*United States v. New Mexico*, 429 U.S. 720, 733 (1982)); cannot impose a tax that operates to discriminate against the United States or those

---

[5] The ". . . . " portion of the 500 kilovolt transmission line illustrated on the map on page 2 of Petitioners' brief is owned by the Petitioners. The "___" portion of the map's transmission line is owned by the BPA.

> with whom it deals (*Washington v. United States*, 460 U.S. 536, 540 (1983)). *It is equally well established, however, that "a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." United States v. County of Fresno*, 429 U.S. at 462. Such a tax must be nondiscriminatory (id. at 464, . . .), and it must not exceed the private party's interest in the federally owned property (*United States v. County of Fresno*, 429 U.S. at 462-463 n. 10 . . .) (Emphasis supplied.) Resp. App. A15.

The Solicitor General also said that the Montana Supreme Court correctly applied these well settled principles to the unique facts in *Pacific I* and *PGE*. Resp. App. A15-17.

This Court recognizes that "[t]he privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937). "The use [of federal property] by a contractor for his own private ends – in connection with commercial activities carried on for profit – is a separate and distinct taxable activity." *United States v. Boyd*, 378 U.S. 39, 44 (1964). This Court recognizes that these taxes prevent unfair trade advantages accruing to private users of exempt properties over their competitors who must pay ad valorem taxes on similar, privately held properties. *United States v. County of Fresno*, 429 U.S. 452, 463 (1977).

The Petitioners do not "actually 'stand in the Government's shoes.' " *United States v. New Mexico*, 455 U.S. 720, 736 (1982). They are not instrumentalities of the United States. They are not agents for the United States. As the

Solicitor General noted in footnote 11 of his brief, the legal and economic incidents of Montana's beneficial use taxes do not fall upon the United States. Resp. App. A24. Also see *Fresno*, 429 U.S. 452. The Federal government has a neutral attitude on this tax. Neither the BPA nor the United States have intervened in this litigation, although they have known about it for over 7 years.[6]

B. The Montana Beneficial Use Tax Does Not Discriminate Against Those Who Contract With the Federal Government or Against Interstate Commerce.

This issue was previously presented to this Court as Issue No. 4 in *PGE* and as part of Issues No. 1 and 2 in *Pacific I*. Contrary to Petitioners' assertion, this issue is not a new issue. The claims of discrimination are based on the Supremacy Clause and the Commerce Clause. On those claims the Solicitor General stated: "As with the petitioner's challenges under the Supremacy Clause and the Commerce Clause, the Montana court's Fourteenth

---

[6] As the Solicitor General stated in footnote 6 of his *PGE* brief, "[t]he federal government, moreover, has not been a party to the litigation in the Montana courts; as a result, the federal government has not contributed to the development of the record as a party, and did not present its views of the intergovernmental immunity issue to the lower courts. By contrast, the two recent federal decisions relied on by petitioner (Pet. 9-10) were cases in which the federal government contributed to the development of the record as a party and presented its views of the intergovernmental immunity issue to the lower courts." Resp. App A18-19.

Amendment analysis rests on the particular factual findings in this case, and does not require this Court's review." Resp. App. A24.

1) The Montana Tax Does Not Discriminate Against Those Who Contract with the United States.

The record shows Montana taxes the beneficial use of all types of tax-exempt property including property owned by the state, local governments, churches and the federal government.[7] Excerpts of that record are reprinted as Resp. App. A45-65.

The Petitioners contend that the Montana beneficial use tax is unconstitutional because Montana does not tax the beneficial use of state-owned railroad right-of-way or track when used exclusively for "rail transportation." This issue is not new; it was raised as issue no. 3 in *Pacific I* and issue no. 4 in *PGE*.[8]

---

[7] For example, the record shows that Department is assessing non-railroad users of state owned property along the CMR and RARUS lines. Pl. Exh. 225P, p. 144. Resp. App. A57.

The record also shows that local assessors are taxing the beneficial use of property owned by the state and subdivisions of the state, e.g., the beneficial use of the industrial park owned by the City of Great Falls, and churches. For example, Pl. Exhibit 248P, p. 15, Resp. App. A61-65.

[8] Both issues were "[m]ay Montana taxing authorities constitutionally impose beneficial-use property taxes on – those it has determined to be users of federal electric power transmission facilities, but at the same time exempt users of facilities owned by the State of Montana from such beneficial-use taxes?"

Montana taxes "similarly situated users" of federal property the same as "similarly situated users" of state property. *Phillips*, infra. During the time in controversy, both the users of state-owned and federal-owned track and railroad right-of-ways were exempt from taxation.[9] They were exempt as long as the track and right-of-way was used exclusively for "railroad transportation". Users of federal-owned railroad track and right-of-ways and users of state-owned track and right-of-way are taxed the same. The exemption of the users of state-owned and federal-owned railroad right-of-ways and track does not give the users of electrical transmission lines a right to be exempt from taxation.[10] Electrical transmission lines are not railroad tracks.

---

[9] The law applicable to the years in question as retroactively amended in Chap. 621, L. 1991 provides: "*The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or tracked* **owned by the United States** or acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state or the United States retains ownership and the right-of-way or track is used exclusively for rail transportation." (Emphasis supplied.)

[10] This Court has held: "[a] legislature has a wide range of choice in classifying and limiting the subjects of taxation." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937); and "the states . . . in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate – these are among the powers of taxation and of constitutional law." *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 368 (1940).

In their brief petitioners failed to state that Montana taxes the beneficial use of state-owned railroad right-of-way or tracks when not used for "rail transportation." Montana also taxes the use of all the state-owned improvements, e.g., buildings, on the right-of-way used by the railroad. See the decision of the State Tax Appeal Board in *Central Montana Railroad v. Department of Revenue*, SPT-1988-13, March 20, 1990. Resp. App. A66. Also see Resp. App. A72-111 for the assessors' lists of users of state-owned railroad right-of-ways and tracks which were taxed under the Montana beneficial use tax during the time in controversy.

The Montana courts in *Pacific I*, *PGE*, and *Pacific II* followed the guidelines set out in *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987) aff'd, 108 S.Ct. 1568 (1988) and *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960) and correctly applied those standards to the facts of the case. See, e.g., Pet. App. A48-82.

After not producing any evidence on this issue before the Montana courts, the Petitioners want to try this issue before this Court upon a new record created by affidavits. This Court has said, "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

2) The Montana Tax Does Not Discriminate Against Interstate Commerce.

This Court has consistently held that "interstate commerce may be made to pay its way" by the states. *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977).

The facts show there is no discrimination. Two of the five Petitioners, Montana Power Co. (MPC) and Pacific Power & Light Co. (PP&L) are intrastate companies. MPC sold the electrical power transmitted over the BPA line throughout Montana. PP&L sold the power it transmitted over the BPA line, including the Garrison to Taft portion of the line, to customers in northwestern Montana. In *Pacific I* the Montana court found that "MPC and PP&L used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines." Pet. App. A68. The burden of the Montana beneficial use tax falls equally upon interstate and intrastate commerce.

The Petitioners contend that the method of assessment imposes disproportionate and discriminatory taxes on them because it "erroneously assumes that all power owned by Petitioners flows over federal facilities and none over nontaxable federal facilities."[11] Pet. Br. i. The District Court and the Montana Supreme Court did not address that issue because that issue was part of the

---

[11] The Petitioners did not accurately describe the assessment method in their footnote 27. For example, the Montana Supreme Court stated: "These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously . . . In negotiating the [contract], the [Petitioners] and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW." Pet. App. A66. The assessment method is based on what is actually taking place under the BPA contract.

pending STAB proceedings. The issue is being reviewed by Montana courts as part of the review of STAB's decision on the assessment method. As the Montana Supreme Court stated "because these issues were brought before STAB, they must be first dealt with at that level." Pet App. A19. See *Weinberger v. Salfi*, 422 U.S. 749 (1975).

The Montana courts also did not address the "power flow" issue because it was decided in the *PGE* decision. The issue was issue no. 5(1) raised in the *PGE* petition to this Court.

Montana does not assess the tax based on the flow of electrical power. The tax is imposed on the contractual right to use the BPA lines, that is, the privilege of using the property. In *PGE* the Montana Supreme Court stated:

> It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. . . .
>
> Reviewing the facts, we conclude that *the tax was imposed on the privilege of using the property.* The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and lines' west to east transmission capacity. (Emphasis supplied.)

Pet App. A90-91.

C. Montana Assessment Methods Do Not Present a Constitutional Question.

1) This Issue is Not Properly Before This Court

The Montana courts declined to hear the Petitioners' allegation that the tax "imposes higher beneficial-use taxes on Petitioners for the portions of the lines used than they would have paid had they owned such portions outright." The Petitioners complain about the "50% at the bottom" or "50% weighting" method of assessing their beneficial use of the BPA lines. On that issue Montana Supreme Court held:

> The final issue deals with a revision of assessment methodology [the "50% at the bottom" method]. As the District Court stated in its denial of the Colstrip Owners' [Petitioners'] Motion for Leave to File First Amended Complaints, under § 15-8-601(3)(c), MCA, challenges to revisions in assessments must be made by appeal to STAB. This District Court correctly refused to hear this issue and, therefore, we will not hear it either. *Once the issue has been brought before STAB a proper judicial review will then be available to the appellants.* (Emphasis supplied.) Pet. App. A20.

The "50% at the bottom" or "50% weighting" method was an issue in STAB's decision in *Pacific Power & Light Co., et al. v. Dept. of Rev.*, Nos. SPT-1988-4 through 11 and 1989-4 (Aug. 30, 1990). That decision is reprinted as Pet. App. A92-115. It is currently on appeal to the Montana First Judicial District Court in *Pacific Power & Light Co., et al. v. Dept. of Rev.*, Cause No. CDV-91-133, Montana First Judicial District Court, Lewis & Clark County.

2) Montana Does Not Impose Greater Taxes on the Petitioners than Are Imposed on Other Taxpayers

As the Solicitor General noted in his *PGE* amicus brief: "Petitioner's objections to the valuation methodology actually employed by the State ([*PGE*] Pet. 22-24), moreover, present factbound issues that do not merit this Court's review." Resp. App. A22.

The Petitioners present this issue in the hypothetical because, as a result of the Petitioners' failure to exhaust their pending administrative remedies, the record is incomplete on this issue. Those facts that are in the record do not support the contentions of the Petitioners. For example, the Petitioners failed to point out that the 1986 value of the Garrison to Taft portion of the BPA line was $184,000,000 and that, as a result of the "50% at the bottom method," the taxable value of their interest in this line was set at $61,000,000 (Def. Exhibit 52; Thane Tr. p. 381). The Petitioners were taxed on only one third the value of the BPA line despite the fact they had almost exclusive use of the line.

This Court has approved using the "full value" of the federal government's property in computing the beneficial use tax.[12] See *Offutt Housing Co. v. County of Sarpy,*

---

[12] § 15-8-111, MCA, provides: "All taxable property must be assessed at 100% of its market value except as otherwise provided." There is no special exception for the assessment of the beneficial use of tax exempt property.

351 U.S. 253, 261 (1956) and *United States v. City of Detroit*, 355 U.S. 466, 470 (1958). In the *PGE* case the Montana Supreme Court also held, "the State had the statutory right to tax [Petitioners] based upon the full value of the facilities." Pet App. A66. Clearly, an assessment method which results in an assessed value of 1/3 the full market value is not unconstitutional.

The portion of the 500 kv transmission line which the Petitioners own is assessed by Montana using the unitary method at 100% of its market value as required by Montana law.

The "half at the bottom" methodology is not unique to the Petitioners' beneficial use tax. This method has been used to assess private property owned by other electrical utilities. See, e.g., *Puget Sound Power & Light Co. v. Department of Revenue*, 761 P.2d 336 (Mont. 1988).

How can the Petitioners be unconstitutionally taxed if they are paying less than half the tax that other taxpayers are paying? How can the Petitioners be unconstitutionally taxed if they are paying less than half the tax that they are paying on their own portion of this continuous transmission line?

D. Congress Has Not Preempted Montana's Taxation of The Petitioners Beneficial Use of BPA Transmission Lines.

This issue was also raised in *Pacific I* and *PGE*. First, the Petitioners allege Montana's beneficial use tax violates 15 U.S.C. 391. That law provides that "[n]o State * * * may impose or assess a tax on or with respect to the

generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." The statute states, a tax as "discriminatory" if "it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." (Ibid.). Since MPC and PP&L pay the same tax as the other three electrical utilities, the tax burden on intrastate electricity is the same as that on interstate electricity. That federal law is not being violated.

Second, the Petitioners contend that taxation is preempted by section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 e(m).[13] The Solicitor General succinctly addressed this question in footnote 8 of his brief:

> Petitioner fails to cite any evidence, however, in either the language of the statute or its legislative history, to support its suggestion that Congress intended the impact aid payments to pre-empt the imposition of otherwise permissible beneficial use taxes. Resp. App. A20.

This Court says that preemption analysis begins with a presumption that Congress does not intend to preempt

---

[13] Any uncertainty about this issue is put to rest by the legislative history. Representative Dingell, in his summary of section 839(m) stated, "[t]he intent is to make these payments reflect the services provided by the government and not any taxes that may have been lost or estimated to have been lost by the communities. This is not a payment-in-lieu-of-taxes provision." (48 Fed. Reg. 55765).

state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Absent clear Congressional intent, preemption can not be implied. (Ibid.)

CONCLUSION

In the present case, Petitioners only raise questions turning entirely on the facts of this case, already resolved twice in favor of Respondents, and without any impact outside the limits of this case. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be **denied.**

Respectfully submitted,

PAUL VAN TRICHT*
Special Attorney General
Montana Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620
Telephone: (406) 444-2852

*Counsel of Record

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

No. 90-1738

In The

Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

vs.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Montana Supreme Court

APPENDIX TO BRIEF IN OPPOSITION

PAUL VAN TRICHT*
Special Assistant
Attorney General
Office of Legal Affairs
Department of Revenue of
The State of Montana
Mitchell Building
Helena, Montana 59620
(406) 444-3341

Attorney for Respondent, Department of Revenue of the State of Montana

*Counsel of Record

June, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

APPENDIX

TABLE OF CONTENTS

Page

Questions Presented in Petitioners' brief in *Pacific Power & Light Co. v. Mont. Dept. of Rev.*, U.S. Sup. Ct. No. 89-364.....A1

Questions Presented in Petitioners' brief in *Portland General Elect. v. Mont. Dept. of Rev.*, U.S. Sup. Ct. No. 89-266.....A3

Brief of the United States as Amicus Curiae in *Portland General Elect. v. Mont. Dept. of Rev.*, U.S Sup. Ct. No. 89-266.....A6

Order Re Plaintiffs' Motion for Leave to File First Amended Complaints, etc., (dated November 1, 1988), *Pacific Power & Light Co. v. Dept. of Rev.*, Cause Nos. ADV-86-069; ADV-87-081; & ADV-88-032; Montana First Judical District Court, Lewis & Clark County.....A26

Order Re Defendants' Motion for Summary Judgment, (dated November 1, 1988) *Pacific Power & Light Co. v. Dept. of Rev.*, Cause Nos. ADV-86-069; ADV-87-081; & ADV-88-032; Montana First Judicial District Court, Lewis & Clark County.....A28

Order Re Plaintiffs' Motion for Stay, (dated November 1, 1988) *Pacific Power & Light Co. v. Dept. of Rev.*, Cause Nos. ADV-86-069; ADV-87-081; & ADV-88-032; Montana First Judicial District Court, Lewis & Clark County ...A32

Pretrial Order, (dated December 19, 1988) *Pacific Power & Light Co. v. Dept. of Rev.*, Cause Nos. ADV-86-069; ADV-87-081; & ADV-88-032; Montana First Judicial District Court, Lewis & Clark County.....A35

Mont. Code Ann. § 15-24-1203 as amended by Chap. No. 621, L. 1991 .....A40

TABLE OF CONTENTS – Continued

Page

Excerpts from Plaintiffs' Exhibit 246P, Deposition of Gregg Groepper, Sept. 29, 1986 ..... A45

Excerpts from Plaintiffs' Exhibit 241P, Examination of Mary Whittinghill, in *Pacific Power & Light Co. v. Mont. Dept. of Rev.*, Cause No. 50978, Montana First Judicial District Court, Lewis & Clark County, March 18, 1987..... A49

Excerpts from Plaintiffs' Exhibit 225P, Deposition of Mary Whittinghill, June 21, 1988..... A55

Excerpts from Plaintiffs' Exhibit 248P, Deposition of Charles Nebel, October 16, 1986 ..... A61

Central Montana Rail, Inc. v. Department of Revenue, No. SPT-1988-13 (Mont. State Tax Appeal Bd. March 20, 1990) A66

Affidavit of Marylan Dallum, Assessor of Chouteau County, Montana..... A72

Affidavit of Traci Long, Assessor of Fergus County, Montana A82

Affidavit of Debbie Jurchich, Assessor of Powell County, Montana A92

No. 89-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Thomas H. Nelson*
James C. Paine
STOEL RIVES BOLEY JONES & GREY
900 S.W. Fifth Avenue, Suite 2300
Portland, OR 97204
Telephone: (503) 224-3380

Donald R. Murray, Jr.
MURPHY, ROBINSON, HECKATHORN & PHILLIPS
One Main Building
P.O. Box 759
Kalispell, MT 59901
Telephone: (406) 752-6644
Counsel for Petitioners

August 30, 1989
**Attorney of Record*

QUESTIONS PRESENTED

May Montana taxing authorities constitutionally impose beneficial-use property taxes on –

1. the Montana Intertie, a federal electric power transmission facility of 500 kilovolts ("kV"), which facility is designed and operated to transmit large blocks of power in interstate commerce, but at the same time exempt from such taxes lower-voltage federal transmission facilities designed and used to transmit lesser amounts of power over shorter distances?

2. interstate utilities for their alleged "use" of federal high-voltage transmission facilities, but at the same time exempt from such taxation intrastate rural electric cooperatives that admittedly "use" such federal facilities?

3. those it has determined to be users of federal electric power transmission facilities, but at the same time exempt users of facilities owned by the State of Montana from such beneficial-use taxes?

4. five interstate utilities for their alleged "use" of the Montana Intertie, notwithstanding (1) that the utilities do not own, possess, or control the Montana Intertie; (2) that BPA transmits power for the utilities over the Montana Intertie pursuant to express congressional direction; and (3) that Congress authorized, and the taxing authorities have collected, federal "impact aid" payments consequent to the construction and operation of the Montana Intertie?

No. _____

In The

Supreme Court of the United States

October Term, 1989

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Thomas H. Nelson*
James C. Paine
Stoel Rives Boley Jones & Grey
900 S.W. Fifth Avenue, Suite 2300
Portland, OR 97204
Telephone: (503) 224-3380

Donald R. Murray, Jr.
Murphy, Robinson, Heckathorn
& Phillips
One Main Building
P.O. Box 759
Kalispell, MT 59901
Telephone: (406) 752-6644
Counsel for Petitioner

August 7, 1989
**Attorney of Record*

QUESTIONS PRESENTED

1. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes upon a shareholder-owned, utility, whose retail customers are located exclusively outside the State of Montana, for its alleged "use" of federal electric power transmission facilities in Montana when such transmission facilities are owned, operated, maintained, possessed, and controlled exclusively by the Bonneville Power Administration ("BPA"), a federal power marketing agency?

2. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes upon such a utility for its alleged use of federal electric power transmission facilities located in the State of Montana, but at the same time refuse to impose such beneficial-use taxes upon Montana rural electric cooperative utilities that receive indistinguishable transmission services from BPA and whose retail electric customers are all located within Montana?

3. May the State of Montana constitutionally impose beneficial-use and ad valorem property taxes on federal electric power transmission facilities of 500kV and over, which high-voltage facilities are designed and operated to transmit large blocks of power in interstate commerce, but at the same time exempt from such taxes lower-voltage federal transmission facilities designed and used to transmit lesser amounts of power over shorter distances?

4. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes upon those it has determined to be users of federal electric power

transmission facilities, but at the same time exempt users of property owned by the State of Montana from such beneficial-use taxes?

5. In imposing beneficial-use ad valorem property taxes upon federal transmission facilities, may the State of Montana constitutionally determine the amount of such taxes based upon assumptions (1) that all the power transmitted flows over taxable high-voltage federal transmission facilities and that, therefore, none flows over tax-exempt lower voltage transmission facilities and (2) that the major value or benefit from the existence of a bidirectional transmission line results from the ability of the line to export power from the state?

No. 89-266

In The

Supreme Court of the United States

October Term, 1989

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

Shirley D. Peterson
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
STEVEN W. PARKS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the state tax assessed against petitioner, based on its contract with the Bonneville Power Administration to have electricity generated by petitioner transmitted over that agency's power lines in Montana, violates the Supremacy Clause, the Commerce Clause, or the Fourteenth Amendment.

TABLE OF CONTENTS

Page

Statement 1

Discussion 6

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) 11, 13

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 13

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 12

United States v. Allegheny County, 322 U.S. 174 (1944) 7

United States v. City of Detroit, 355 U.S. 466 (1958) 7

United States v. County of Fresno, 429 U.S. 452 (1977) 7

TABLE OF AUTHORITIES – Continued

United States v. Hawkins County, 859 F.2d 20 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1638 (1989)..... 10

United States v. Jackson County, Missouri, 696 F. Supp. 479 (W.D. Mo. 1988) 10

United States v. New Mexico, 455 U.S. 720 (1982)...7, 16

Washington v. United States, 460 U.S. 536 (1983)..... 7

Constitution and Statutes:

U.S. Const.:

Art. I, § 3, Cl.8 (Commerce Clause) 5, 6, 11, 12, 13, 14, 15

Art. VI (Supremacy Clause)..... 6, 12, 15

Amend. XIV..... 6, 14, 15

Due Process Clause..... 5

Equal Protection Clause..... 5

15 U.S.C. 391.....5, 6, 10, 11, 13

16 U.S.C. 832c..... 2

16 U.S.C. 839c(c) 15

16 U.S.C. 839e(m)..... 12

Mont. Code Ann. (1989):

§ 15-23-101(2)..... 4

§ 15-24-1203..... 4

No. 89-266

In The

Supreme Court of the United States

October Term, 1989

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is an investor-owned, Oregon corporation which provides retail electric utility services to customers located in the State of Oregon. Petitioner owns an undivided 20% interest in two coal-fired generating facilities, Colstrip Units 3 and 4, located in southeastern Montana. The remaining 80% interest in Colstrip Units 3 and 4

is owned by four other utility companies which provide retail electric utility services to customers in a number of western States, including Montana.[1] Colstrip Units 3 and 4 began operation in October of 1983 and 1985, respectively. Pet. App. 14a, 22a-23a.

With the development of Colstrip Units 3 and 4, petitioner and the other Colstrip owners needed additional transmission capacity to carry electricity generated at the Colstrip facilities to the west, where their customers are located. The Colstrip owners took various steps to provide the necessary capacity. First, they converted existing transmission lines of lower voltage to a 500 kilovolt transmission line from the Colstrip generating plant to Broadview, Montana. Pet. App. 31a. Second, they built a double circuit 500 kilovolt transmission line from Broadview, Montana to a point near Townsend, Montana. *Id.* at 32a. Third, the Colstrip owners requested that the Bonneville Power Administration (BPA)[2]

---

[1] The other four owners of Colstrip 3 and 4 are Pacific Power & Light Company (which provides retail electric utility service to customers located in Montana, Idaho, California, Wyoming, Washington and Oregon), Washington Water Power Company (which provides retail electric services in Washington and Idaho), Puget Sound Power & Light Company (which provides retail electric services in western Washington), and Montana Power Company (which provides retail electric services in Montana). Pet. App. 22a, 30a.

[2] BPA markets power from the federal generation system in the Pacific Northwest, and it owns approximately 75% of the total transmission grid in the Pacific Northwest. Pet. App. 33a. Under 16 U.S.C. 832c, States, public power districts, counties, municipalities, and cooperatives are accorded preferential

(Continued on following page)

construct 500 kilovolt transmission lines west from Townsend, Montana to Garrison, Montana (the Montana Intertie line) and west from Garrison, Montana to Taft, Montana (the Garrison West line). *Id.* at 32a-33a, 53a. BPA agreed. The Montana Intertie line was completed in 1983; the Garrison West line, in contrast, was not completed until 1986. *Id.* at 53a. Prior to completion of the Garrison West line in 1986, the only 500 kilovolt line providing access from Garrison, Montana to the Idaho border was the BPA-owned line running from Hot Springs, Montana, to Dworshak, Idaho. *Id.* at 23a.

In connection with the construction of the Montana Intertie line and the Garrison West line, the Colstrip owners entered into long-term contracts with BPA. They acquired the contractual right to have BPA transmit Colstrip power over BPA's Montana Intertie line for a period of 22 years, with a right by the owners to renew at comparable terms. Pet. App. 37a-39a. They also entered into separate contracts from the transmission of power by BPA westward from Garrison, *Id.* at 23a.

Under petitioner's agreement, power would be transmitted from Garrison over BPA's "main grid" system to an Oregon substation. Pet. App. 23a. According to petitioner's report to the State, it had "a contract right to certain services provided by [BPA]" on the 500 kilovolt

---

(Continued from previous page)

access to BPA power. Most of BPA's preference customers in Montana, including rural electric cooperatives (REAs), receive BPA power after that agency transmits it over federal lines to interconnections with intermediate utilities which then carry the power to the cooperatives. Pet. App. 34a.

line between Hot Springs, Montana and the Idaho border. *Id.* at 16a, 25a.[3] Under the contractual terms, moreover, after scheduling of Colstrip power over BPA's Hot Springs-to-border line began, petitioner was required to make monthly payments to BPA, regardless of the amount of electricity transmitted. *Id.* at 25a.

2. Montana imposes ad valorem property taxes on property owned by corporations. This tax is fully applicable to utilities; it specifically includes "electric power or transmission lines." Mont. Code Ann. § 15-23-101(2) (1989). In addition, Montana imposes a general beneficial use tax on private users of tax-exempt property – the tax is on "the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation." Mont. Code Ann. § 15-24-1203 (1989). In 1983, the Montana legislature amended this beneficial use tax statute to include explicitly electrical transmission lines of 500 kilovolts or more. As a result, the beneficial use tax specifically provides that "[t]he tax shall be imposed upon the possession or other beneficial use of an electrical transmission line and associated facilities,

---

[3] Prior to the completion of the Garrison West line in 1986, a gap existed in the 500 kilovolt lines between Garrison and Hot Springs. BPA's capacity to transmit Colstrip power between Garrison and Hot Springs was limited to 330 megawatts transmitted over 230 kilovolt lines. Pursuant to contracts, BPA reserved this lower transmission capacity to the five Colstrip owners, pending completion of the 500 kilovolt Garrison West line; the Colstrip owners allocated this capacity among themselves, and petitioner obtained the right to transmit 65 megawatts. Pet. App. 14a-16a, 23a-24a.

except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax." *Ibid.*

3. The Montana Department of Revenue (DOR) assessed a beneficial use tax, for 1984, against the Colstrip owners. The basis for the assessment was the DOR's determination that the Colstrip owners had a beneficial use of BPA's Intertie line. Pet. App. 30a, 41a, 52a-54a. Similarly, for 1985, the DOR assessed an additional beneficial use tax against petitioner. The basis for that assessment was the DOR's determination that petitioner had a beneficial use of BPA's line from Hot Springs, Montana to the Idaho border. *Id.* at 14a, 16a, 25a.

The Colstrip owners brought suit in Montana state court challenging the tax assessment for use of the Intertie line on the ground that the tax violated the Supremacy Clause, both because it contravened principles of intergovernmental immunity and because it violated 15 U.S.C. 391, which prohibits state discrimination against electricity transmitted and generated in interstate commerce. They also raised objections based on the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as state law. In addition to being a plaintiff in that suit, petitioner also filed suit in Montana state court challenging the imposition of the beneficial use tax for use of the line from Hot Springs to the Idaho border. Pet. App. 21a-22a, 44a.

On December 21, 1987, the Montana state trial court rejected the Colstrip owners' claim regarding the imposition of the beneficial use tax for use of the Intertie line. Pet. App. 29a-50a. On January 19, 1988, the court similarly rejected petitioner's challenge to the use tax for use

of the Hot Springs line, and relied on its decision in the prior case. *Id.* at 13a-20a.

On April 17, 1989, the Montana Supreme Court affirmed the trial court's decision regarding the tax on the Colstrip owners for use of the Intertie line. Pet. App. 51a-70a (the Intertie decision). On May 10, 1989, moreover, the Montana Supreme Court affirmed the trial court's decision regarding the tax on petitioner for use of the Hot Springs line. *Id.* at 21a-28a (the Hot Springs decision). The court relied in large part, on its analysis in the prior Intertie decision. *Id.* at 25a.

In this petition, petitioner seeks review of the Hot Springs decision. In a separate pending petition (*Pacific Power & Light Co. v. Montana Dep't of Revenue*, No. 89-364), petitioner and the other Colstrip owners seek review of the Intertie decision.

DISCUSSION

Petitioner contends that the assessment of taxes by the DOR for its alleged beneficial use in 1985 of BPA's 500 kilovolt line between Hot Springs, Montana and the Idaho border violates the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment. Because the Montana Supreme Court's decision rests on highly specific factual grounds and does not appear to present an issue of recurring significance, we do not believe that review by this Court is warranted.

1. Petitioner's claim under the Supremacy Clause is two-fold. Petitioner contends (Pet. 6-10) that the tax violates principles of intergovernmental immunity because

petitioner did not operate, control or service the line, and petitioner's contract with BPA therefore did not confer on petitioner a beneficial use interest in BPA's line so as to permit taxation of such an interest. In addition, petitioner contends (Pet. 10-11) that the Montana tax violates 15 U.S.C. 391 by taxing only the beneficial use of high capacity 500 kilovolt electric lines, which are used to transmit electricity over long distances.

a. Under settled principles of intergovernmental immunity, it is well established that, in the absence of congressional consent, a State cannot impose a tax directly on the United States (*United States v. New Mexico*, 455 U.S. 720, 733 (1982)); cannot impose a tax the legal incidence of which falls on the United States (*United States v. County of Fresno*, 429 U.S. 452, 459 (1977)); and cannot impose a tax that operates to discriminate against the United States or those with whom it deals (*Washington v. United States*, 460 U.S. 536, 540 (1983)). It is equally well established, however, that "a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *United States v. County of Fresno*, 429 U.S. at 462. Such a tax must be nondiscriminatory (*id.* at 464; *United States v. City of Detroit*, 355 U.S. 466, 473 (1958)), and it must not exceed the private party's interest in the federally owned property (*United States v. County of Fresno*, 429 U.S. at 462-463 n.10; *United States v. Allegheny County*, 322 U.S. 174, 186-187 (1944)).

The Montana Supreme Court cited these general principles. Expressly relying on *County of Fresno*, it stated,

in the Intertie decision, that a "state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established but that such a tax "must be imposed equally on others similarly situated." Pet. App. 54a. Similarly, in the Hot Springs decision that is the subject of this petition, the Montana court explicitly adopted by reference its reasoning in the Intertie decision (*id.* at 25a) and again stated that a "tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace." *Id*, at 27a.[4]

In its decisions, the Montana court rejected the utilities' contention that a finding of possession, exclusive use, or control is necessary to support a beneficial use tax on the purported user of federal property (Pet. App. 26a, 55a), and undertook an extensive factual analysis to determine whether there is a sufficient use of federal property to justify imposition of the state tax. In the Intertie decision, the court determined that the Colstrip owners have "an enforceable contract interest which gives them the right to the beneficial use of firm- . . . megawatts of power transmitted over the Montana Intertie line" (*id.* at 56a); that the Colstrip owners have

---

[4] In both decisions, the court addressed the meaning of "beneficial use" in the context of interpreting the reach of the state statute (Pet. App. 26a, 58a); in both decisions, however, the court relied primarily on federal principles and authority regarding intergovernmental immunity in determining whether the tax on the "beneficial use" was permissible. *Id.* at 26a-28a, 54a-57a. See also *id.* at 44a-45a (in Intertie case, trial court addresses Colstrip owners' beneficial use argument as Supremacy Clause challenge).

"the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power" (*ibid.*); that the Colstrip owners' right is "subject only to the BPA's ability to transmit these amounts onward" (*ibid.*); that the "project scheduled power . . . remained under the ownership of the [utilities]" (*ibid.*); that the Colstrip owners have "exercised this right and used these lines to transmit power for their own commercial profit-making activities" (*ibid.*); and that the Colstrip owners are primarily responsible for the total annual cost of the lines (*ibid.*) Similarly, in the Hot Springs decision, the Court found that petitioner "contracted for firm transmission capacity over the BPA lines" (*id.* at 26a); that it thereby received "an enforceable contract interest in firm megawatts of power" (*ibid.*); that "the power flowing through the lines remain[s] under [petitioner's] ownership" (*ibid.*); that petitioner "pays for the use of the lines regardless of the actual transmission flow" (*ibid.*); and that "the reservation of firm transmission demand grants [petitioner] an exclusive right" (*ibid.*). The Montana court's decisions thus rely on highly specific factual determinations.

Petitioner's principal intergovernmental immunity claim (Pet. 6-10) is limited in its scope. Petitioner's principal claim is not the legal incidence of the tax falls on the federal government; nor is it that the tax impermissibly discriminates against those who deal with the federal government.[5] Petitioner's principal intergovernmental

---

[5] In a footnote, petitioner summarily notes that the legal incidence and discriminatory application are "addressed" in the context of its other claims. Pet. 9 n.10.

immunity claim, rather, is that "beneficial-use taxes may not be imposed on account of federal property unless the taxpayer possesses and controls the facilities subject to the tax" (Pet. 6) and that the Montana Supreme Court's rejection of this claim was erroneous (*ibid.*).

In light of the highly specific factual circumstances relied on by the Montana Supreme Court, however, petitioner does not present substantial reasons for this Court to address that argument and to review the Montana court's conclusion that a sufficient use of federal power lines existed to warrant state taxation of private use of those lines. Petitioner suggests that the Montana court's opinion will have wide-ranging consequences. Pet. 6-7. This prediction is belied, however, by the narrow, case-specific circumstances on which the Montana court relied. Accordingly, further review of this issue by this Court is not necessary at this time and in this case.[6]

---

[6] Amici Pacific Gas and Electric et al. contend that the Montana court's decisions will have broad applicability, particularly regarding taxation of utilities who contract with the federal government. Amici Br. 1-6. To the extent that the Montana court's decisions may be given more farreaching consequences than are apparent from the court's opinions and the petition, those developments can and should be addressed, on their merits, in subsequent litigation. The federal government, moreover, has not been a party to the litigation in the Montana courts; as a result, the federal government has not contributed to the development of the record as a party, and did not present its views of the intergovernmental immunity issue to the lower courts. By contrast, the two recent federal decisions relied on by petitioner (Pet. 9-10) were cases in which the federal government contributed to the development of the

(Continued on following page)

b. Petitioner also contends (Pet. 10-11) that Montana's beneficial use tax violates 15 U.S.C. 391 because it taxes only beneficial use of lines with a capacity of at least 500 kilovolts, and does not tax beneficial use of lines with lower voltage. The statute provides that "[n]o State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity" (15 U.S.C. 391); the statute defines a tax as "discriminatory" if "it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce" (*ibid.*) In *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), this Court held that a New Mexico tax provision, which in effect gave a tax benefit only to electricity sold in New Mexico, violated Section 391. Petitioner maintains that Montana's use tax is similarly discriminatory because the restriction to lines of at least 500 kilovolts results in a greater tax burden on electricity that is generated and transmitted in interstate commerce.

Selective taxation of high voltage lines clearly has the potential to discriminate against electricity in interstate commerce. Again, however, the specific factual findings

---

(Continued from previous page)

record as a party and presented its views of the intergovernmental immunity issue to the lower courts. See *United States v. Hawkins County*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 109 S. Ct. 1638 (1989); *United States v. Jackson County, Missouri*, 696 F. Supp. 479 (W.D. Mo. 1988).

relied on by the Montana court suggest that the issue does not merit review in this case. In the Intertie decision, the court noted that one of the five utilities – Montana Power Company – is an "intrastate user" and that Montana Power "is taxed at the same rate as the other users of the facilities." Pet. App. 64a.[7] The court specifically distinguished *Arizona Public Service* because electricity sold to Montana consumers is treated no differently from electricity sold to consumers in other States (Pet. App. 63a-64a). We are mindful that inclusion of an intrastate entity, or some intrastate consumers, does not necessarily validate a discriminatory tax. Nevertheless, the findings we have described counsel against the need for this Court's review in this case.[8]

---

[7] The Montana Power Company (MPC), one of the Colstrip owners, is "a Montana corporation which provides retail electric service to customers located in Montana." Pet. App. 30a. Another of the Colstrip owners – Pacific Power & Light – also has customers in Montana (as well as five other States. *Ibid.* In the Commerce Clause part of its analysis in the Intertie decision, the Montana court noted that "MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines." *Id.* at 59a.

[8] As an additional Supremacy Clause ground, petitioner asserts in a footnote (Pet. 11 n.13) that by authorizing "impact aid" payments to local governments with respect to major federally owned transmission facilities (16 U.S.C. 839(m)), Congress "appears to have intended" that the impact aid payments would be the sole source of revenue available to local taxing districts from federal transmission facilities. Petitioner fails to cite any evidence, however, in either the language of the statute or its legislative history, to support its suggestion that Congress intended the impact aid payments to pre-empt the imposition of otherwise permissible beneficial use taxes.

2. Petitioner also contends (Pet. 12-24) that the beneficial use tax violates the Commerce Clause. Under settled Commerce Clause principles, a state tax is valid if it is applied to an activity that has a substantial nexus with the taxing State; if it is fairly apportioned; if it does not discriminate against interstate commerce; and if it is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In the Intertie decision, the Montana Supreme Court addressed each of these factors. Pet. App. 58a-62a. In the Hot Springs decision, as on other issues, the court explicitly adopted by reference its analysis in the Intertie decision. *Id.* at 25a.

Petitioner's principal contention is that the tax discriminates against interstate commerce.[9] For the same reasons that the Section 391 argument regarding discrimination does not require review, however, the argument under the Commerce Clause likewise does not warrant review. Indeed, Section 391 has been interpreted to impose a more stringent antidiscrimination requirement than the Commerce Clause. *See Arizona Public Service Co. v. Snead*, 441 U.S. at 152 (Rehnquist, J., concurring in the

---

[9] Although petitioner suggests that the taxed activity lacks the requisite nexus to the taxing State (Pet. 12-13), the Montana court correctly determined, in the Intertie decision, that the contracts to transmit the Colstrip owners' power from their in-state generating plants over lines within the State constitute sufficient nexus (Pet. App. 58a-59a), and the same analysis applies to the Hot Springs contract. Although petitioner also suggests that the basis for the tax "calls into question" the fair apportionment and fair relationship prongs, petitioner addresses those issues only "in the context" of its other arguments. Pet. 13.

judgment). The Montana court applied the established Commerce Clause framework to the facts of the case; relying on *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), it found that impermissible discrimination had not been established because interstate and intrastate consumers are treated the same. Pet. App. 59a. The court's fact-specific determinations do not call for further review.[10]

3. Finally, petitioner challenges (Pet. 24-25) the Montana tax under the Fourteenth Amendment. Petitioner maintains that the tax violates due process and equal protection.

---

[10] In addition to arguing that the limitation to lines of 500 kilovolts or more is discriminatory, petitioner claims that three other provisions reveal the State's discrimination. In fact, none of the three supports petitioner's claim. Petitioner first objects (Pet. 15-16) that rural electric cooperatives are taxed at 3% while investor-owned property is taxed at 12%; this general objection to tax rates applicable to non-exempt property is a fundamentally different claim from the challenge to the imposition of the beneficial use tax at issue here. Petitioner also objects (Pet. 17-18) to the differential treatment of rural electric cooperatives in a state statute authorizing a tax on federal property if Congress gives permission to do so; since Congress has not given such permission, however the state provision is not operative and its mere existence is weak support for petitioner's claim, even if it is otherwise relevant. Finally, petitioner objects (Pet. 18-19) to a 1987 amendment to the beneficial use statute; since that amendment post-dates the assessment at issue here, it is not relevant to the claim at issue. Petitioner's objections to the valuation methodology actually employed by the State (Pet. 22-24), moreover, present fact-bound issues that do not merit this Court's review.

Petitioner's due process objection is that there is an insufficient nexus between it and the Hot Springs-Idaho border line to justify imposition of the tax. Pet. 24. In the Intertie decision, however, the Montana court responded to the due process argument by pointing out that, under its *Complete Auto Transit* Commerce Clause analysis in the Intertie opinion, the court had found a sufficient nexus between the object of the tax and the State to justify the tax, and a fair relationship between the tax and the services provided by the State. Pet. App. 66a-67a. In that analysis, the Montana court had found that nexus was satisfied because the utilities had contracted for the use of BPA lines in Montana to transmit power through Montana (*id.* at 58a-59a), and that fair relationship was satisfied because the tax was imposed on the basis of the activities within the State (*id.* at 62a). Petitioner fails to offer a substantial reason for reviewing these findings (either with respect to both decisions or solely with respect to the Hot Springs decision), or for finding a due process violation if these determinations stand.

Petitioner's equal protection challenge (Pet. 25) is based on the claim that the beneficial use tax is being administered in an unequal fashion. Petitioner contends that the tax is not being imposed on rural electric cooperatives and that it had not been imposed in the past unless a taxpayer had physical possession and exclusive use of otherwise exempt facilities. *Ibid.* In the Intertie decision, the Montana court rejected petitioner's equal protection challenge, noting that the possession of "firm transmission demands in 500 KV lines" reasonably distinguished petitioner from the rural electric cooperatives (Pet. App. 67a); the claim regarding possession and use, moreover, is

essentially a recasting of the beneficial use intergovernmental immunity claim, and the Montana court's findings regarding a sufficient use are applicable. As with petitioner's challenges under the Supremacy Clause and the Commerce Clause, the Montana court's Fourteenth Amendment analysis rests on the particular factual findings in this case, and does not require this Court's review.[11]

---

[11] The legal claims by petitioner and the other Colstrip owners in the petition challenging the Intertie decision (*Pacific Power & Light v. Montana Dep't of Revenue*, No. 89-364) are similar to the claims in this petition. In that petition, the Colstrip owners explicitly state that the legal incidence of the tax falls on the federal government. Cf. note 5, *supra*. However, they merely assert, without explanation, that the "incidence" of the beneficial use taxes "is in part on BPA because of the 'exchange' provision of the Regional Act" (89-364 Pet. 16). Evidently, the Colstrip owners are referring to 16 U.S.C. 839c(c), under which the BPA must purchase electricity generated by privately owned utility companies at the average system cost of the utility's resources, and offer, in exchange, to sell an equivalent amount of electric power to the utility for resale to residential users within the region. Under the decisions of this Court, however, it is clear that, even if the BPA may pay a higher cost to the utility as a result of the utility's having paid beneficial use taxes, that fact does not necessarily shift the incidence of the tax from the utility to the BPA. See, *e.g.*, *United States v. New Mexico*, 455 U.S. 720, 734 (1982).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
STEVEN W. PARKS
Attorneys

DECEMBER 1989

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFIC POWER AND LIGHT COMPANY, et al.,	)	Cause No.
	)	ADV-86-069
	)	ADV-87-081
Plaintiffs,	)	ADV-88-032
	)	
– vs –	)	
	)	ORDER RE
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al.,	)	PLAINTIFFS'
	)	MOTION FOR LEAVE
	)	TO FILE FIRST
Defendants.	)	AMENDED
	)	COMPLAINTS
	)	AND PLAINTIFFS'
	)	MOTION FOR
	)	PARTIAL SUMMARY
	)	JUDGMENT

Plaintiffs have filed a Motion for Leave to File First Amended Complaints in the above-consolidated cases. The matter has been briefed, orally argued, and submitted for decision. In accordance with the opinion below, Plaintiffs' motion is DENIED.

Plaintiffs state that their motion is based upon the Department of Revenue's (DOR's) revision of its tax assessments for tax years 1986 and 1987. However, Plaintiffs admit repeatedly, in their brief, that:

"assessment revisions may be challenged only by appeal to the State Tax Appeal Board." (Plaintiffs' Brief filed July 8, 1988, p. 1, lines 22-23)

"[t]he sole manner for challenging revisions is by appeal to STAB under 15-8-601(3)(c), MCA. . . . " (*Id.* at p. 2, lines 23-25)

"Again, because the sole route for challenging revisions to assessments is to go to STAB, . . . it appears clear that STAB has exclusive jurisdiction first to review these arguments." (*Id.* at p. 5, lines 1-5)

This Court agrees with Plaintiffs that under Section 15-8-601(3)(c), MCA, STAB has jurisdiction over Plaintiffs' challenges to DOR's revisions in assessments. Therefore, Plaintiff's motion to amend its complaints in order to add such challenges is DENIED.

Plaintiffs also filed a motion for partial summary judgment with regard to one of their challenges to DOR's revision of its tax assessment. Since this Court has denied Plaintiffs' motion to amend its complaints in order to add such a challenge, Plaintiffs' motion for partial summary judgment on such challenge is moot, and therefore, DENIED.

DATED this 1st day of November, 1988.

/s/ Henry Loble
DISTRICT JUDGE

pc: Counsel of Record
pacific.or2

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFIC POWER AND LIGHT COMPANY, et al., Plaintiffs,	)	Cause No. ADV-86-069 ADV-87-081 ADV-88-032
– vs –	)	
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al., Defendants.	)	ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MATTER BEFORE THE COURT

Defendants filed a Motion for Summary Judgment and an accompanying brief on July 22, 1988. Plaintiffs submitted an answer brief and Defendants responded with a reply brief. The matter was orally argued and submitted for decision on September 26, 1988.

DECISION

In accordance with the Opinion below, Defendants' Motion for Summary Judgment with regard to imposition of beneficial use taxes upon Plaintiffs for their use of the Townsend-Garrison 500 kV transmission line system and facilities for tax years 1985, 1986, and 1987 is GRANTED.

OPINION

Summary judgment under Rule 56(c), M.R.Civ.P., is properly granted only when the record discloses no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Cate v. Hargrave*, ___ Mont. ___, 680 P.2d 952, 41 St.Rep. 697 (1984). To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Kober v. Steward*, 148 Mont. 117, 417 P.2d 476 (1966). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, ___ Mont. ___, 670 P.2d 1386, 40 St.Rep. 1676 (1983).

Defendants have requested summary judgment in their favor with respect to imposition of beneficial use taxes upon Plaintiffs for their use of the Townsend to Garrison 500 kV – transmission line system for tax years 1985, 1986, and 1987. In December 1987, this Court in Cause No. 50978 affirmed the imposition of beneficial use taxes upon Plaintiffs as a result of their use of the Townsend to Garrison transmission line system for tax year 1984. According to Defendants, Plaintiffs raised the same claims in the consolidated cases at hand as they raised in Cause No. 50978. Plaintiffs disagree.

First, Plaintiffs assert that the tax years in these consolidated cases are different than the tax year in Cause No. 50978. Plaintiffs are correct. However, if the tax year is the *only* difference, then Plaintiffs assertion is without any effect.

Second, Plaintiffs contend that the methodology used to determine taxes that were at issue in Cause No. 50978,

the so-called forty percent solution, is different than that used in the cases at hand. Plaintiffs state:

> This Court explicitly relied upon "the 40 percent solution" in its Order upholding the Department's imposition of taxes on the Colstrip Owners in that cause [50978]. See Order in Cause No. 50978 at p. 24. In subsequent years, however, the Department's methodology flip-flipped; *now* the Department first determines each utility's unit value *without* the beneficial use property, and then adds 50 percent of the cost of the federal facilities before allocating value to Montana. "The 40 percent solution" has gone by the wayside.

(Plaintiffs' Brief in Support at p. 7)

On page 24 of its Opinion in Cause No. 50978, as referred to above by Plaintiffs, this Court recognized the forty percent solution while addressing Count 1 of Plaintiffs' complaint, the supremacy clause claim. This Court did not "explicitly rely" on the forty percent solution in such order.

Mary Whittinghill, Bureau Chief for DOR, stated as follows with regard to the forty and fifty percent approaches:

> The Department has determined that the inclusion of the beneficial use tax assessment of the Pacific Power and Light Company as an additive to the unit method is appropriate. As you are aware, the Department has weighted the beneficial use tax assessment of Montana 500 kV transmission line facilities for PPL at 50%. The inclusion of a beneficial use interest within the cost indicator is affected by the 40% weighting process for the traditional three indicators of

> value within the unit method. Since the Department relies upon cost as a measure of the beneficial use tax interest of each Colstrip owner in 500 kV transmission line facilities in Montana, *the net effect of either method should be substantially the same.* (Emphasis supplied)

(Letter dated July 1, 1988 from Mary Whittinghill to Robert Strong, Property Tax Supervisor at Pacific Power and Light, which is attached as Exhibit B to Defendants' Brief in Opposition to Motion for a Stay filed July 25, 1988)

The difference between the forty and fifty percent methodologies is not a genuine issue of material fact.

Plaintiffs' other reasons for opposing this summary judgment motion are, either by their own admission or by this Court's orders on Plaintiffs' motion to amend the Plaintiffs' motion for summary judgment, rendered not applicable or moot.

Since there is no genuine issue of material fact and because Defendants are entitled to a judgment with regard to imposition of beneficial use taxes upon Plaintiffs for their use of the Townsend-Garrison 500 kV transmission line system and facilities for tax years 1985, 1986, and 1987 is GRANTED.

DATED this 1st day of November, 1988.

/s/ Henry Loble
DISTRICT JUDGE

pc: Counsel of Record
pacific.msj

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFIC POWER AND LIGHT COMPANY, et al., Plaintiffs,	)	Cause No. ADV-86-069 ADV-87-081 ADV-88-032
– vs –	)	ORDER RE PLAINTIFFS' MOTION FOR STAY
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al., Defendants.	)	

During the spring of 1988, Plaintiffs were notified that DOR had revised the beneficial use tax assessments for Plaintiffs for tax years 1986 and 1987. In their brief, Plaintiffs state that they appealed the revised assessments to the State Tax Appeal Board (STAB) on five separate grounds:

1. "[T]he revisions employed an incorrect depreciation period."

2. "[DOR] taxed those facilities as if they had been in operation all year."

3. "[T]he Department made a factual error. . . . [which] was caused by its misreading of BPA Garrison-West contracts in effect on the assessment date; the Department incorrectly assumed that the 'reserved transmission demands' . . . were at the maximum amount as of December 31, 1985."

> 4. "[T]he Department's revisions tax the Colstrip Owners as if *all* Colstrip power were flowing over the Garrison-Taft 500 kV facilities and *none* were flowing over the 230 kV federal facilities west of Garrison."
>
> 5. "[T]he Department's treatment of the federal facilities as 'Class Four' property was erroneous for Montana statutes establish that those facilities should be taxed as 'Class Four' property."

Plaintiffs also state that "each of these five specifications of error involves factual determinations regarding *value and methodology, as opposed to pure questions of law.*" [Emphasis supplied] Plaintiffs have filed this Motion to Stay requesting that this Court "postpone hearing the legal questions related to such values until after STAB decides the underlying factual and methodological issues."

First, there are no legal questions with regard to Plaintiffs' valuation claims pending before this Court. The pending beneficial use tax cases involve constitutional and statutory claims. Three claims arise under the United States Constitution – violation of the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment; three claims involve state constitutional courts; and the last claim involves Plaintiffs' beneficial use or lack thereof of the transmission system. This Court specifically denied Plaintiffs' request to add valuation claims to the pending beneficial use tax litigation. See this Court's Order Denying Plaintiffs' Motion to Amend.

Secondly, this Court, not STAB is the finder of fact with the regard to the beneficial use tax cases. The parties may seek judicial review of STAB's decision, and such

review may come before this Court. However, such review would be entirely separate and apart from the beneficial use tax litigation and subject to a different standard of review.

Third, the parties may seek to introduce into evidence, in the beneficial use tax case, information about valuation. This Court does not have jurisdiction to address the appropriateness of any valuation, but such information may be admissible to establish a constitutional violation.

Plaintiffs' Motion for Stay is without legal basis and, therefore, is DENIED.

DATED this 1st day of November, 1988.

/s/ Henry Loble
DISTRICT JUDGE

pc: Counsel of Record
pacific.sta

MONTANA FIRST JUDICIAL DISTRICT
COURT, LEWIS AND CLARK COUNTY

PACIFIC POWER AND LIGHT COMPANY, et al., Plaintiffs, v. THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al., Defendants.	)	INDEXED Nos. ADV-86-069 ADV-87-081 ADV-88-032 (Consolidated) FILED Dec 19, 1988

PRETRIAL ORDER

Pursuant to Rule 16, Montana Rules of Civil Procedure, and the Court's scheduling order of February 29, 1988, a preliminary pretrial conference between counsel, without the Court, was held in the above-entitled consolidated actions at the offices of Murphy, Robinson, Heckathorn & Phillips in Kalispell, Montana, at 9:00 a.m. on July 13, 1988. Counsel for the parties met in a pretrial conference with the Court on July 18, 1988 at 8:30 in Helena, Montana. Counsel participating in those pretrial conferences were as follows:

COUNSEL FOR THE PLAINTIFFS:

Donald R. Murray
Murphy, Robinson, Heckathorn & Phillips
P.O. Box 759
Kalispell, MT 59903-0759

Thomas H. Nelson
Stoel, Rives, Boley, Jones & Grey
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204-1268

COUNSEL FOR THE DEFENDANTS:

Larry G. Schuster
Montana Department of Revenue
Steamboat Building
Helena, MT 59620

As a result of those pretrial conferences and pursuant to Rule 5, Uniform District Court Rules and the Court's February 29, 1988, scheduling order, the following pretrial order is entered.

* * *

PLAINTIFFS' CONTENTIONS

Plaintiffs' contentions are as follows:

1. BPA exclusively owns, possesses, operates, controls and maintains the 500 kv electric transmission lines and associated facilities from Townsend to the Garrison Substation, from the Garrison Substation to the Taft Substation, and from the Hot Springs Substation to the Montana-Idaho border. The Colstrip owners have no rights or ownership nor any right to occupy, possess, control or maintain those BPA transmission lines and associated facilities.

2. With the exception of the Colstrip owners, the Department has not imposed "beneficial use" taxes, pursuant to 15-24-1203, MCA, upon any entity not having either occupancy or actual physical possession of the subject federally owned property.

3. The taxes imposed and threatened to be imposed on the Colstrip owners pursuant to 15-24-1203, MCA, are illegal and unlawful and exceed the taxing authority of

the Montana Department of Revenue and the Defendant counties upon the grounds which follows:

(a) Imposition of the challenged tax violates Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) in that, *inter alia*, (i) the tax is upon the possession or use of property, which tax is applied to property acquired, owned, possessed, operated, and maintained exclusively by BPA, and is not applied to property in any way owned, occupied, possessed or used by Plaintiffs; (ii) the tax discriminates against federal functions in that the tax is computed based on the full cost of the BPA lines and associated facilities, even though Plaintiffs are not entitled to the full benefit flowing from such lines and facilities; (iii) the tax impedes and inhibits federal functions.

(b) Imposition of the challenged tax violates Article VI, Clause 2, of the United States Constitution (the Supremacy Clause) in that the tax is preempted by Section 212(a) of the Tax Reform Act of 1976, 15 U.S.C. 391 (1982) ("Anti-Discrimination Act"), and by 16 U.S.C. 839e(m) (1982) (the Pacific Northwest Electric Power Planning and Conservation Act of 1980).

(c) Imposition of the challenged tax violates the 14th Amendment to the United States Constitution in that, *inter alia*, (i) no tax is imposed upon any party on account of federal transmission lines and associated facilities of under 500 kv; (ii) no tax is imposed upon any other entities on account of the BPA transmission lines and associated facilities here in question except the Plaintiffs, even though there are entities which receive transmission services over BPA 500 kv facilities indistinguishable from the transmission services provided to the Colstrip owners; (iii) property or "beneficial use" taxes

are imposed upon Plaintiffs even though Plaintiffs neither have a property interest in, nor the right to possession or use of, the transmission lines and associated facilities upon which such taxes are based; and (iv) no tax is imposed upon any party on account of their obtaining services from other tax exempt facilities located within the State of Montana, including, but not limited to, service facilities, government recreational facilities and the like.

(d) Imposition of the challenged tax violates Article I, Section 8 of the United States Constitution (the Commerce Clause) in that, *inter alia*, (i) it creates an undue burden upon, and illegally discriminates against, interstate commerce; and (ii) it constitutes an impermissible interference with interstate commerce under 15 U.S.C. 391.

(e) Imposition of the challenged tax violates Article VIII, Section 5(1)(a) of the Montana Constitution in that, *inter alia*, the agreements between Plaintiffs and BPA do not grant Plaintiffs a private interest in the property of BPA and Plaintiffs have no such interest.

(f) Imposition of the challenged tax violates Article XIII, Section 1, Clause 3 of the Montana Constitution in that, *inter alia*, such taxes constitute the imposition of a new liability on Plaintiffs in respect to transactions or considerations already passed.

(g) Imposition of the challenged tax violates Article II, Section 31 of the Montana Constitution in that, *inter alia*, such taxes impair the obligations of Plaintiffs' contracts with BPA.

(h) Imposition of the challenged tax is not authorized by 15-24-1203, MCA, for the reason that Plaintiffs do not and will not enjoy a "beneficial use" of the electric transmission lines and

associated facilities the alleged "use" of which is being taxed.

(i) Imposition of the challenged tax is beyond the authority of 15-24-1203, MCA, for the reason that several of the Plaintiffs are being subjected to taxation for their alleged "beneficial use" of electric transmission liens and associated facilities having a design capacity of *less* than 500 kv, which are specifically exempted from taxation.

(j) Imposition of the challenged tax is illegal and unlawful for the reason that the Department has employed an improper appraisal methodology by, *inter alia*, (i) employing a 40 year depreciation life for the federal 500 kv facilities; (ii) erroneously classifying the federal 500 kv facilities as class 11 property under 15-6-141, MCA; (iii) by erroneously assuming that all transmission of power related to the Colstrip project west of the Garrison Substation flows over BPA 500 kv facilities, and that correlatively, no such power flows over tax exempt BPA facilities of lower voltages; and (iv) for tax year 1986, the tax imposed on account of the BPA 500 kv facilities west of the Garrison Substation were not calculated with reference to any "use" of such facilities by Plaintiffs, but instead by assuming that Plaintiffs had the equivalent of ownership of such facilities for the entire tax year.

* * *

SENATE BILL NO. 438

INTRODUCED BY B. BROWN, HARRINGTON, HALLIGAN, ECK, CRIPPEN, MAZUREK, T. BECK, REAM, STANG, HAGER, ELLISON, GILBERT, M. HANSON, SCHYE

BY REQUEST OF THE SENATE TAXATION COMMITTEE

IN THE SENATE

FEBRUARY 19, 1991	INTRODUCED AND REFERRED TO COMMITTEE ON TAXATION.
	FIRST READING.
FEBRUARY 23, 1991	COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED.
FEBRUARY 25, 1991	PRINTING REPORT.
	ON MOTION, CONSIDERATION PASSED FOR THE DAY.
FEBRUARY 26, 1991	SECOND READING, DO PASS.
FEBRUARY 27, 1991	ENGROSSING REPORT.
	THIRD READING, PASSED. AYES, 47; NOES, 0.

IN THE HOUSE

MARCH 4, 1991	INTRODUCED AND REFERRED TO COMMITTEE ON TAXATION.
	FIRST READING.

APRIL 13, 1991	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
APRIL 16, 1991	SECOND READING, CONCURRED IN.
APRIL 17, 1991	THIRD READING, CONCURRED IN. AYES, 98; NOES, 1. RETURNED TO SENATE.

IN THE SENATE

APRIL 17, 1991	RECEIVED FROM HOUSE. SENT TO ENROLLING. REPORTED CORRECTLY ENROLLED.

SB 0438

[THE GREAT SEAL OF THE STATE OF MONTANA]

AN ACT EXEMPTING FROM BENEFICIAL USE TAXATION RAILROAD TRACKS AND RIGHT-OF-WAY OWNED BY THE UNITED STATES; AMENDING SECTION 15-24-1203, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 15-24-1203, MCA, is amended to read:

"**15-24-1203. Privilege tax on gainful use of tax-exempt property – exceptions.** After March 17, 1969, there is imposed and shall be collected a tax upon the

possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track *owned by the United States or* acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state *or the United States* retains ownership and the right-of-way or track is used exclusively for rail transportation."

Section 2. **Effective date – retroactive applicability.** [This act] is effective on passage and approval and applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1986.

I hereby certify that the within bill originated in the Senate.

/s/ David L. Hunter
Secretary of the Senate

/s/ Joseph P. Mazurek
President of the Senate
Signed this 19 day
of April 1991.

/s/ Hal Harper
Speaker of the House
Signed this 19th day
of April 1991.

CHAPTER NO. 621

SENATE BILL NO. 438

INTRODUCED BY B. BROWN, HARRINGTON, HALLIGAN, ECK, CRIPPEN, MAZUREK, T. BECK, REAM, STANG, HAGER, ELLISON, GILBERT, M. HANSON, SCHYE

BY REQUEST OF THE SENATE TAXATION COMMITTEE

AN ACT EXEMPTING FROM BENEFICIAL USE TAXATION RAILROAD TRACKS AND RIGHT-OF-WAY OWNED BY THE UNITED STATES; AMENDING SECTION 15-24-1203, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

This bill was received by
the Governor this 20 day
of April 1991

/s/ Stan Stephens
Governor

By /s/ Don Ramage
Approved 4/24/91
/s/ Stan Stephens
Governor

STATE OF MONTANA

FILED

APR 25 1991

SECRETARY OF STATE

By Nancy J. Harte
Deputy

PLAINTIFF EXHIBIT 246P
DEPOSITION OF GREGG GROEPPER
SEPT. 29, 1986

* * *

[p. 34] would refer to as the County Appraiser – is a State employee in Montana competitively hired, subject to the same rights and benefits as other State employees.

All the staff that work for that county appraisal supervisor are State employees. We frequently move them around the State to help out in other counties. They're State employees. We don't have – The County doesn't have a role in property tax in Montana.

Q. Turning back to your administration of the beneficial use tax statute; are there any other portions of the administration that I haven't covered that come to mind?

A. I think I've covered the history so far and the past interpretations and instances in which it's been applied. There are other instances in which the beneficial use tax has been applied, if that's what you're looking for.

Q. Yes, I am. What would they be?

A. To get to the meat of this; we have applied beneficial use tax against Rarus Railroad. It's a short-line railroad in operation from Butte to Anaconda. R-A-R-U-S, I believe, is how you spell that company. They bought the railroad locomotives, I believe, and some end line structures from Butte and Anaconda Pacific Railroad.

The trackage was sold to the State of Montana or given to the State of Montana for a buck or two, but Rarus, has to use a portion of that trackage from Butte to Anaconda and [p. 35] they are beneficial use assessed for

the trackage, the track and right-of-way, that is State of Montana property. The Central Montana Railroad from Lewistown to wherever they go to –

Q. Central Montana Railroad?

A. Right. Geraldine, perhaps. I'm not sure where they go to. They're in the same situation. The railroad company owns the engines and some buildings, and the State of Montana owns the line; and Rarus – or I mean Central Montana uses the rail line that belongs to the State of Montana and they are beneficially use assessed for the rail line.

There are doctors who have clinics in hospitals, and when that situation arises, we beneficial use assess a portion of the hospital which would otherwise be tax exempt in Montana to the clinic and assess the doctor for use of the clinic.

There are – I forget the exact factual relationship, but there are some buildings that are owned by Indian tribes in the western part of the state that they have leased out portions of the building that they own to either a store or a clinic or something or other, and we pick up that portion as a beneficial use assessment.

Q. Are there any others?

A. I'm sure there probably are. Those are the ones [p. 36] that come to light.

Q. You mentioned two railroad instances; one being Rarus and the other being Central Montana Railroad. Are the facts analogous in each case; in other words, the land is owned by the State but it's occupied by the railroad that pays the –

A. Well, I think generally the facts are the same. I'm not sure about the contractual relationship between the State of Montana and the Department of Commerce in those two entities. I've been led to believe it's somewhat different for Rarus than it is for Central Montana.

Rarus has some contractual arrangement five or six years down the road to buy the line, the land, and the rail back from the State of Montana; and I'm not sure that's the case with Central Montana Railroad.

Factually, in both of those situations, the State of Montana owns the rail line used by railroad companies, and we are beneficial use assessing that line, the trackage, and the ground to the Company.

Q. And the trackage or the ground is the ground that's actually occupied by the railroad for its tracks?

A. The railbed and the right-of-way.

Q. Which entity, the State or the railroad, controls access to the railbed and right-of-way?

A. When you say "controls access," it's my [p. 37] understanding that for ICC purposes, whenever you operate a railroad, you've got to have a fence up and they have to keep people out of it. I think that's the responsibility not of the State of Montana, but of the two railroads.

Q. Is that property fenced?

A. That's my understanding. There are roads that go across the rail line like roads everyplace, but there is a fence along the sides of the right-of-way.

Q. Have you ever been physically or personally on those rights-of-way?

A. Well, I haven't been to the Central Montana right-of-way because that originates in Denton. But I've been across the right-of-way at Butte-Anaconda Pacific that is now Rarus'. I've driven across the – I haven't been up and down the track, but I've driven across the road at a couple of different points.

Q. How do you come to the value of the property owned by the State which is assessed to the individual in those cases, or to a company?

A. That's a problem for the local appraisers to come up with, to figure out what the market value of that land is and assess it back to the company.

Q. I believe you indicated in the Rarus case, it was sold for a dollar or two. Would that be the market value of the land?

* * *

PLAINTIFFS' EXHIBIT 241
EXAMINATION OF MARY WHITTINGHILL

TRANS. *PACIFIC POWER AND LIGHT CO. V. DEPT. OF REVENUE*, NO. 50978, MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY, MARCH 18, 1987

* * *

[p. 985] Q Want me to restate the question?

A Please.

Q Do you know whether the department has ever imposed any beneficial use taxes upon any entity other than the plaintiffs in this case when those entities did not have exclusive possession or control of the subject property?

A I am aware of a couple of situations. Yes.

Q What are they?

A I would say that – two plaintiff railroad companies or two railroad companies in the State of Montana who are leasing in one situation railroad right of way from the State of Montana, do not have exclusive control over that right of way. And the fact that the state still retains the leased right of way to third parties. In both those situations the department has assessed to the railroad company beneficial use on that railroad right of way even though they don't have exclusive control of that right of way.

Q They do have possession of or control of the right of way, is that correct?

A They do – it is my understanding that they do not have complete control over that right of way because there are contracts with third parties for [p. 986] subsequent lease of railroad right of way.

Q All right. Are these the transactions that Mr. Groepper I believe referred to in his testimony? The two shortline railroads?

A I believe they are the same ones.

Q Okay. Do you have independent knowledge of – that beyond what Mr. Groepper described?

A I would say we would have approximately the same amount of knowledge of that.

Q Okay. Is your response today meant to be inconsistent with his testimony?

A I – I can't remember exactly what you are referring to what he would have said.

Q Candidly I am not trying to trap you, but I am trying to understand if this is meant to be a modification of the department's stance regarding those railroads or not.

A I guess it is my testimony.

Q Okay. What – basis does the department use to determine value of those rights of way? How do you assess value based upon that situation?

A We use the same unit approach methodology to assess those shortlines.

Q So that would be in addition to the cost approach?

[p. 987] A Yes. It was – we looked at cost and income. The income indicator could not be relied upon because there was lack of information on the income. We relied on lease agreements.

Q But you didn't add a separate value at the end of your appraisal for that property, did you?

A No, we did not.

Q So it was added into each of the components of the unit value and assessed in that manner, is that correct?

A Only in the cost indicator.

Q Right.

A That is the only indicator we used.

Q Basically treated precisely the same way as it was by the department in the Townsend to Garrison lines in '84 and '85, is that correct?

A In the same way insofar as their entire property is in Montana.

Q Uh hu. With that caveat. It was added into the cost indicator, but no adjustment after the fact made of the entire value and no adjustment made to stock and debt and no adjustment made to income indicator, is that correct?

A That is correct. We only used one indicator.

Q Sure. When you added that to the cost

* * *

[p. 1073] A No.

Q During his cross examination Mr. Nelson alluded to various types of other sorts of tax exempt property which the Department of Revenue treats for beneficial use tax purposes the State of Montana and you alluded to

two railroads. Would you restate those railroads again for the Court, please?

A One is called Rarus Railroad. And the other one is called CMR. Railroad, which is an abbreviation for Central Montana Rail.

Q Has the Department of Revenue had occasion to treat those properties to beneficial use tax purposes?

A Yes, we have.

Q And when did that occur, please?

A That occurred for the 1986 tax year.

Q And were you responsible in part at least for the preparation of those beneficial use tax assessments?

A Yes, I was.

Q With respect to Rarus Railroad, what did you do to assess beneficial use taxes against that property?

A I treated it as leased property – treated as [p. 1074] leased property the leased right of way that is owned by the State of Montana to that railroad.

Q And what documents did you have in your possession for purposes of making the assessment?

A I had the company's balance sheet reports or their book costs and any other financial statements such as the income statement and a lease agreement with the State of Montana.

Q Is it your understanding that the Rarus or the corporate entity which operates that railroad has exclusive possession and use of the railroad and railroad trackage?

A No, that is not my understanding.

Q How did you come to that understanding?

A By realizing that there were leases on that right of way to third parties.

Q Let's discuss the assessment of Central Montana Railway for just a moment. Were you responsible in part for that assessment?

A Yes, I was.

Q And what did you do to prepare that assessment?

A Basically the same thing that I did with the Rarus Railroad beneficial use assessment, but also with Central Montana Rail they don't own any of the property whatsoever. It is all totally owned by [p. 1075] the State of Montana, including the locomotives, the cars, the buildings, all the facilities are owed by the State of Montana, so the entire assessment was a beneficial use assessment to that company.

Q And which specific documents did you have at your disposal for purposes of making that assessment?

A I also had a balance report and income statement and a contract with the State of Montana.

Q Is it your impression that the Central Montana Railway has the exclusive use or possession of that property which they are leasing from the State of Montana?

A No, it is my understanding that they also have lease agreements with third parties on the right of way.

Q Were either of those assessments challenged judicially or administratively to the best of your knowledge?

A Yes, they were.

Q And where were they challenged? Do you recall?

A In the State Tax Appeal Board.

Q What was the result of those challenges?

* * *

PLAINTIFFS' EXHIBIT 225P
DEPOSITION OF MARY WHITTINGHILL
JUNE 21ST, 1988

* * *

[p. 142] A. Two months in 1983 for the 1984 assessment, and this is two months of 1985 operation for the 1986 assessment.

Q. Are you saying that's the basis for doing it, because you had precedent for doing it that way on the Townsend to Garrison line?

A. Not just the precedents, but treating it in the same fashion, and that's what we typically do in an assessment, is look to what the operations are as of December 31 of each year prior to that assessment year.

Q. But do you do that for beneficial use taxes as well as property taxes in existence as of the assessment date?

A. That's how we treat beneficial use assessments of railroad right-of-way.

Q. Can you give me a citation to the case where you've done it that way?

MR. SCHUSTER: For a railroad, do you mean?

Q. (By Mr. Nelson) Sure.

A. I don't think that we've had a litigation case on the beneficial use of the right-of-way at this present time.

Q. I'm not asking for a litigated case. But you're telling me that you do that administratively, and it hasn't been challenged; is that correct?

A. That's correct.

Q. Can you tell me what cases you've done that in for railroad right-of-way?

[p. 143] A. Not litigation cases, but just situations?

Q. Yes, just administrative situations.

A. If a lease was not – if it expired on October 31, we wouldn't pick it up for the next year's assessment.

Q. So you're saying that really you have an assessment date trigger that determines whether there will be a beneficial use assessment for the entire year; is that correct?

A. I would have to say that's half true. You'd have to look at the contractual arrangements that are there, what the contract is saying at December 31 of any year prior to that assessment year.

Q. You said you did that in a railroad situation. Would those railroad situations include the CMR?

A. I can no longer assess the Central Montana Rail.

Q. I'm aware of that.

A. I'm referring to individual lessees along the railroad right-of-way in terms of any railroad in Montana.

Q. So that would not be the railroad operator; that would be somebody who has a grain warehouse or something?

A. That's correct.

Q. So it's somebody who would be installing facilities on the property that would itself belong to the railroad; is that what we're talking about?

A. We're not even looking at if they've installed the facility.

[p. 144] Q. How common is that situation?

A. Which situation?

Q. Where you do a beneficial use assessment on somebody who beneficially uses railroad property, and the person beneficially using the railroad property isn't running trains; is that common situation?

A. Yes.

Q. What kind of facilities do you tax under that type of scenario?

A. Anyone who has a contract lease with the railroad as of December 31 of each particular year.

Q. Why would your Department do that as opposed to –

A. I'm not picking those up. I'm informing the counties of these leases.

Q. Then the counties go out – It's locally assessed property, though.

A. That's correct.

Q. But your instruction to the county is to apply a beneficial use tax to those leases; is that correct?

A. The Department's instruction is to do that.

Q. Is that a long-standing instruction, or is that something relatively recent?

A. Relatively recent.

Q. Do you know what has been happening in prior years before these instructions went out? Would there be any taxes [p. 145] upon those facilities at all?

A. On the land, no.

Q. Can you tell me when you started giving those instructions?

A. As soon as we got the leases from the railroads, when the settlement with the railroads was over.

Q. The settlement with which railroad?

A. Burlington Northern, Union Pacific, and the Sioux line.

Q. Tell me what that's about. Was there litigation?

A. It was litigation.

Q. When was the settlement?

A. I'll just briefly kind of fill you in. Part of this agreement to provide the leases was not built into the settlement agreement per se. It was an agreement outside the Court-filed settlement to say that the railroads are going to start collecting the leases to give to the Department of Revenue, and as the settlement expired at the end of 1985 tax year, the railroad started gathering the information.

The administrative rule had been on the books prior to that time; the Department just did not have the information to give to the county offices.

Q. So some property had in prior years escaped assessment?

A. Not per se. It was picked up as – A portion of the [p. 146] land value to the railroad property.

Q. So then the railroad would have been paying taxes that should have rightfully been paid by the "user," of the property; is that what we're saying?

A. I thing that the lease determines who was to pay the taxes, so I don't know if you can say who rightfully should pay the taxes. I think the lease determines that in those situations.

Q. Were there any administrative rules in place to govern that beneficial use application to the leases on the railroad property?

A. The administrative rule tells the – explains the difference between what is operating and non-operating railroad property right-of-way.

Q. And it would be non-operating property that would be subject to beneficial use tax; is that correct?

A. That's correct.

Q. But owned by a third party, not the railroad?

A. Owned by a third party?

Q. Yes.

A. No. It's still owned by the railroad, the land.

Q. Yes.

A. Okay.

Q. But under the control of the third party, leased to

* * *

CORRECTION SHEET

Please make all changes or corrections on this sheet showing page, line and reason, if any. DO NOT make any marks on the original deposition.

Sign this sheet; sign the deposition before a Notary Public at and on the line provided; and return the original deposition to the Court Reporter for filing with the Clerk of Court of this district.

PAGE	LINE	CORRECTION AND REASON
143	14	answer should read "I can no longer assess the state owned track leased by Central Montana Rail"
145	8	"Sioux line" should be "Soo Line"

/s/ Mary Whittinghill
SIGNATURE HERE AND ON DEPOSITION

/s/ Sharon K. Ferguson
NOTARY PUBLIC 7-21-90

PLAINTIFF EXHIBIT 248P
DEPOSITION OF CHARLES NEBEL
OCTOBER 16, 1986

* * *

[p. 8] You're talking about property owned by the city?

A Right.

Q Okay.

A They developed an industrial park.

Q All right.

A The City of Great Falls did. And of course it was off the tax rolls because it was owned by the city. And they might even be buying it; we don't know. But the city informs us that John Doe is going to use this piece of property, and they'll give us a legal description, or it's – they'll give us a name and we tax it City of Great Falls in care of John Doe.

Q Okay. So as a starting point, then, since it's owned by the city, you can't tax it.

A That's right.

Q But if a private individual is using it for the benefit of that individual, then you do tax it?

A Right.

Q Okay. Well, let's lump those together, then, private parties using property owned by the City of Great Falls. Is there any other situation in which this beneficial use tax has been imposed by your county apart from this situation we just mentioned in Boeing Aircraft?

A You're asking me to remember a lot. We've got 58,000 tax pieces.

* * *

[p. 13] Q What do you look for?

A Well, if it's in the city, the city will give us a list of names of everything that they've – but, like I say, they might lease this part of Gore Hill to me at – where the airport is. I might build a building. Well, they let us know if they – out here in this subdivision, the industrial park that they developed, they give us an update every year of what happened in that industrial part.

Q Do you look for a written lease?

A No.

Q What do you look for?

A We take the city's word for it, and the people, we inform them what we've done. They never – go along. That's part of their business, taxes.

Q Okay, but I'm asking you what information – what is it that triggers in your office the determination that you'll impose a tax?

A The City of Great Falls will send me a list of transactions that they've had with different individuals between the Great Falls Industrial Park, and if it's – a building is going up, we go out there, meet with the people. We measure the building, we put a valuation on it, we send them the value we put on it, and that's the way –

Q Okay. What is it, though – what features – maybe I'm not asking this very well. Before you can tax these [p. 14] people, they've got to have some –

A They've reached agreement with the City of Great Falls on that property out there, whether –

Q What kind of agreement?

A Whether they're going to buy it, lease it, to build; whatever they're going to do with it. That's really none of my business, the agreement the city's made. All the city's informed us, that John Doe has acquired this piece of property in the park they developed out there. And they developed it with the idea of fixing the tax – building more tax base in the City of Great Falls.

Q Well, do these people lease from the city?

A I don't know. They could lease; they could be buying it on a contract for deed. We have no idea, because they do not have to – the contract for deed is between the buyer and the seller.

Q Okay. Well, they're either buying it or leasing it. Are there any other situations in which you have imposed a tax?

A Not that I can think of.

Q So it's either a purchase or a lease?

A Right.

Q Are those necessary elements before your office will impose the tax?

A Yeah, I'd say that, because how – we don't know [p. 15] that the city might have built a building out there.

Q Have you ever taxed anybody that wasn't in possession of the tax-exempt property?

A Not that I know of.

Q Is the decision to tax under these situations a decision that's made by your office, Mr. Nebel?

A Well, we usually make it. We might phone the department and say, "This is what problems we've got; what do you suggest?" And they might go to – it might be Larry right now, to the lawyer, and we go from there.

Q Have you ever received any kind of – well, I take it you have. Have you ever received any guidance from the department with respect to the imposition of this beneficial use tax?

A I know the department was in on us with Boeing. I know we talked to them. I know that I talked to Jess Munro, when Jess was there, about it.

Q Okay.

A We – as they scaled down their operation here, they scaled down the amount of floor space they were using, and we scaled down. We wanted to be fair with them, just as they wanted to be fair with us.

Q Have you ever received any written information or guidelines from the department with respect to the imposition of this tax?

[p. 16] A Probably, but that's been so many years ago I don't have it anymore. I mean, I don't keep – that's – what I can say, it's been a number of years.

Q You do remember, however, receiving something?

A Oh, yes, I remember receiving something from Jess on it.

Q Can you tell me what you remember about it?

A They had wrote that – they said they were scaled down. And we went out and met with them and agreed. Because one year we – I can remember that we taxed them like they were using the full building, and they asked that they – it be scaled down, and we scaled it down to what they were using.

Q Do you ever remember receiving anything else from the Department of revenue regarding this tax?

A No. I don't remember that we – there's so many things we receive on different deals, you'd have to – my memory's not that good to remember everything.

Q No, I know. Do you have a specific recollection of any – for example, any guidelines for your use in determining what users of tax-exempt property you can tax?

A No. They just – we go out and check it. We go out and check tax-exempt property steady, not just for federally exempt property that people's using, but churches, city and state.

* * *

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

CENTRAL MONTANA RAIL, INC.,	)	DOCKET NO.: SPT-1988-13
Appellant,	)	
-vs-	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER and OPPORTUNITY FOR FOR JUDICIAL REVIEW
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,	)	
Respondent.	)	

The above-entitled appeal came on regularly for hearing on the 20th day of February, 1990, in the City of Helena, Montana, pursuant to the order of the State Tax Appeal Board of the State of Montana (the Board). The notice of said hearing was duly given as required by law setting the cause for hearing. The taxpayer, represented by Ray F. Koby, attorney; and Richard A. Hitchcock, former general manager of Central Montana Rail, Inc., presented testimony in support of the appeal. The Department of Revenue (DOR), represented by Larry G. Schuster, tax counsel, Vernon F. Fogle, tax appraisal specialist for the Centrally Assessed Property Division of the DOR; Roger Pollard, Fergus County appraisal supervisor, and John D. Craig of the Intermodal Commodities Bureau of the Department of Commerce, presented testimony in opposition thereto. At this time and place, testimony was presented, exhibits were received. The Board then

allowed a period of time for filing of post-hearing briefs. When said briefs were filed, the Board then took the cause under advisement; and the Board having fully considered the testimony, exhibits, briefs, and all things and matters presented to it for its consideration by all parties in the docket, and being well and fully advised in the premises, finds and concludes as follows:

FINDINGS OF FACT

I.

Due, proper and sufficient notice was given of this matter, the hearing hereon, and of the time and place of said hearing. All parties were afforded opportunity to present evidence, oral and documentary.

II.

The issue in this appeal involves the Appellant's contention that a building constructed in 1985-86 upon railroad right-of-way deeded to the State of Montana in 1985 should be exempt from property taxation. The basis for the taxpayer's exemption request is the enactment by the 1987 Legislature of an amendment to Section 15-24-1203, MCA:

> The tax may not be imposed upon the possession or other beneficial use of railroad *right-of-way or track* acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is used exclusively for rail transportation. (Emphasis supplied)

III.

Central Montana Rail, Inc., (hereinafter CMR) operates on railroad property consisting of 66.14 miles of mainline trackage between Spring Creek Junction and Geraldine, which is commonly referred to as the "Geraldine Branch."

The Interstate Commerce Commission authorized the Burlington Northern Railroad (BN) to abandon the 66.14 miles of rail line in July, 1984. The State of Montana acquired the Geraldine line in March of 1985 from the Burlington Northern Railroad in a settlement agreement. During that same month in 1985, the State of Montana leased the right-of-way to CMR.

CMR had need for a facility containing an area for the servicing, repair and storage of railroad engines and cars, office space and storage of rail transportation materials. The rail line property conveyed to the State of Montana did not include such a facility.

The 220 feet by 60 feet building was completed during the late winter of 1985 and spring of 1986. It is constructed within the right-of-way conveyed to the State by BN at a cost of $375,000 from trust funds provided by the State which were acquired from BN in connection with the aforementioned settlement agreement. The State retains ownership of this building under the terms of the lease agreement between CMR and the State of Montana, though any property taxes on the property are assessed to CMR.

The building was assessed for the 1988 tax year at a value of $300,992.

IV.

The subject improvements were not physically situated on the railroad right-of-way when BN conveyed the rail line to the State of Montana. The building was constructed subsequent to the conveyance of the property to CMR from the State of Montana under a lease agreement.

CONCLUSIONS OF LAW

I.

The Board finds that the Legislative intent of the 1987 amendment to Section 15-24-1203, MCA, was to exempt from beneficial use taxation *only* the railroad right-of-way and track acquired by the state pursuant to Title 60, chapter 11, part 1, and retained in ownership by the State. The wording of this statute is clear and unambiguous and contains references to only two properties to be excluded from beneficial use taxation: railroad right-of-way and track. The language of Section 15-24-1203, MCA, as amended by the 1987 Legislature, cannot be construed in such a manner as to assume that the Legislature also meant to exclude from taxation any improvements constructed on the railroad right-of-way.

II.

The Board finds that the DOR properly denied tax exemption to the subject property. For the foregoing reasons, the above appeal is hereby denied.

ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property shall be retained on the tax rolls of Fergus County at the value of $300,992 for the improvements, as determined by the Department of Revenue.

DATED this 20th day of March, 1990.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/s/ John Rothwell
JOHN ROTHWELL, Chairman

(SEAL)

/s/ Mary E. Hempleman
MARY E. HEMPLEMAN, Member

/s/ Patrick E. McKelvey,
PATRICK E. MCKELVEY, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order. Section 15-1-402(4), MCA, provides: "Any action instituted to recover any such portions of tax or license fee paid under protest shall be commenced and summons timely served within 60 days after the date of the final decision of the state tax appeal board."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of March, 1990, the foregoing Order of the Board was

served on the parties hereto by depositing a copy thereof in U.S. Mails, postage prepaid, addressed to the parties as follows:

Ray F. Koby
Attorney at Law
Swanberg, Koby and Swanberg
P.O. Box 2567
Great Falls, Montana 59403

Larry G. Schuster
Tax Counsel
Property Assessment Division
Department of Revenue
Mitchell Building
Helena, MT 59620

/s/ Donna Westerbur
Donna Westerbur, Secretary

No. 90-1738

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

PACIFIC POWER & LIGHT, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

AFFIDAVIT

State of Montana)
: ss.
County of Chouteau)

MARYLAN DALLUM, being first duly sworn, says:

1. That she is the Assessor of Chouteau County, Montana;

2. That the attached documents are property tax assessments for beneficial use of state owned railroad right-of-way and improvements on that railroad right-of-way for tax year 1987;

3. That this same state owned right-of-way and track is also used for railroad purposes by Central Montana Railroad;

4. That she has placed these same properties on the tax rolls in each subsequent tax year, up to and including the current 1991 tax year.

DATED this 21 day of May, 1991.

/s/ Marylan Dallum
MARYLAN DALLUM

State of Montana)
: ss.
County of Chouteau)

On this 21 day of May, 1991, before me a Notary Public for the State of Montana, personally appeared MARYLAN DALLUM, the within instrument and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this 1481, 1489 certificate above written.

/s/ Sydney Lopp
Notary Public for the
State of Montana
Residing at Fort Benton

My Commission Expires:

(SEAL) 4/23/94

CHOUTEAU COUNTY

1987 ASSESSMENT NOTICE OF REAL PROPERTY SUBJECT TO TAXATION

General Mills
P.O. Box 1113 % Tax Dept.
Minneapolis
Minn. 55440

Tax Roll Number: 81200
School District: #44C
Date: 05/12/87
Page: 1

From Land Value: 5,700.00 From Improvements Value: 377,800.00

To Land Value: 5,700.00 To Improvements Value: 257,226.00

Property Description and Location	Class Code Catagory	Tax-Able %	Acres or Qty	Market Value
Geraldine Elevator	4 3817 Industrial Improvements	3.860	.000	154400.00
Fertilizer Plant	4 3817 Industrial Improvements	3.860	.000	11100.00
025-2040-19-44C-28	4 3817 Industrial Improvements	3.860	.000	91726.00
025-2040-19-44C-23	4 2611 Industrial Land	3.860	.000	1700.00
025-2870-19-44C-29	4 2611 Industrial Land	3.860	.000	4000.00
47481200	8 6514 Mfg. Machinery & Tools	11.000	.000	15833.00
	8 6514 Mfg. Machinery & Tools	11.000	.000	4032.00
	8 6514 Mfg. Machinery & Tools	11.000	.000	33120.00
	9 6311 Comm. Furn. & Fixtures	13.000	.000	100.00
	Total of Class 4		.000	262926.00
	Total of Class 8		.000	52985.00
	Total of Class 9		.000	100.00
	Grand Total of all Classes			316011.00

04/24/88

INDUSTRIAL PROPERTY BUREAU
HELENA, MONTANA 59601

ASSESSOR: PLEASE CHANGE YOUR RECORDS TO REFLECT CHANGES TO OUR 1987 VALUES FOR THE BELOW LISTED ACCOUNTS.

GENERAL MILLS
VALUES PER 88 STIPULATION
GERALDINE MT

TAXPAYER ID
DATE APPRAISAL 01/01/87
DATE M & E 06/14/88

ASSESSOR CODE		1987 VALUE
2611	LAND	
2651	NEW INDUSTRY LAND	
3110	FARM IMPROVEMENTS	
3817	INDUSTRIAL IMPROVEMENTS	11100
3851	NEW INDUSTRY IMPROVEMENTS	
4211	TRUCKS 1 AND 1-1/2 TON	
4231	TRUCKS OVER 1-1/2 TON	
4271	COAL & ORE HAULERS	
4301	BUSSES	
4531	TRAILERS	
4532	TRAILERS UNDER 18K	
5811	CHICKENS	
6111	FARM MACHINERY	
6201	MOBILE HOMES	
6311	FURNITURE & FIXTURES	
6511	HEAVY EQUIPMENT	
6514	MFG TOOLS & EQUIPMENT	4032
6515	MINING MACH & EQUIPMENT	
6518	NEW INDUSTRY-OTHER PROPERTY	
6519	SUPPLIES & MATERIALS	

6811 POLLUTION CONTROL
6834 RADIOS ETC
TOTAL PLANT VALUE 15132

PLEASE REFER TO COMPANY NAME AND NUMBER ON ALL INQUIRYS
COMPANY NO 025-2870-19-44C-29
ASSESSOR: PLEASE CHECK THE HEAVY EQUIPMENT LIST FOR ANY ITEMS THAT MAY HAVE BEEN SM PLATED OR LICENSED FOR THIS TAX YEAR. THANK YOU

04/24/88

INDUSTRIAL PROPERTY BUREAU
HELENA, MONTANA 59601

ASSESSOR: PLEASE CHANGE YOUR RECORDS TO REFLECT CHANGES TO OUR 1987 VALUES FOR THE BELOW LISTED ACCOUNTS.

GENERAL MILLS
VALUES PER 88 STIPULATION
GERALDINE MT

TAXPAYER ID
DATE APPRAISAL 01/01/87
DATE M & E 06/14/88

ASSESSOR CODE		1987 VALUE
2611	LAND	1700
2651	NEW INDUSTRY LAND	
3110	FARM IMPROVEMENTS	
3817	INDUSTRIAL IMPROVEMENTS	91726
3851	NEW INDUSTRY IMPROVEMENTS	
4211	TRUCKS 1 AND 1-1/2 TON	
4231	TRUCKS OVER 1-1/2 TON	

4271	COAL & ORE HAULERS	
4301	BUSSES	
4531	TRAILERS	
4532	TRAILERS UNDER 18K	
5811	CHICKENS	
6111	FARM MACHINERY	
6201	MOBILE HOMES	
6311	FURNITURE & FIXTURES	100
6511	HEAVY EQUIPMENT	
6514	MFG TOOLS & EQUIPMENT	15833
6515	MINING MACH & EQUIPMENT	
6518	NEW INDUSTRY-OTHER PROPERTY	
6519	SUPPLIES & MATERIALS	
6811	POLLUTION CONTROL	
6834	RADIOS ETC	
TOTAL PLANT VALUE		109359

PLEASE REFER TO COMPANY NAME AND NUMBER ON ALL INQUIRYS
COMPANY NO 025-2040-19-44C-23
ASSESSOR: PLEASE CHECK THE HEAVY EQUIPMENT LIST FOR ANY ITEMS THAT MAY HAVE BEEN SM PLATED OR LICENSED FOR THIS TAX YEAR. THANK YOU

04/24/88

INDUSTRIAL PROPERTY BUREAU
HELENA, MONTANA 59601

ASSESSOR: PLEASE CHANGE YOUR RECORDS TO REFLECT CHANGES TO OUR 1987 VALUES FOR THE BELOW LISTED ACCOUNTS.

GENERAL MILLS
VALUES PER 88 STIPULATION
GERALDINE MT

TAXPAYER ID
DATE APPRAISAL 01/01/87
DATE M & E 06/14/88

ASSESSOR CODE		1987 VALUE
2611	LAND	4000
2651	NEW INDUSTRY LAND	
3110	FARM IMPROVEMENTS	
3817	INDUSTRIAL IMPROVEMENTS	154400
3851	NEW INDUSTRY IMPROVEMENTS	
4211	TRUCKS 1 AND 1-1/2 TON	
4231	TRUCKS OVER 1-1/2 TON	
4271	COAL & ORE HAULERS	
4301	BUSSES	
4531	TRAILERS	
4532	TRAILERS UNDER 18K	
5811	CHICKENS	
6111	FARM MACHINERY	
6201	MOBILE HOMES	
6311	FURNITURE & FIXTURES	
6511	HEAVY EQUIPMENT	
6514	MFG TOOLS & EQUIPMENT	33120
6515	MINING MACH & EQUIPMENT	
6518	NEW INDUSTRY-OTHER PROPERTY	
6519	SUPPLIES & MATERIALS	
6811	POLLUTION CONTROL	
6834	RADIOS ETC	
TOTAL PLANT VALUE		191520

PLEASE REFER TO COMPANY NAME AND NUMBER ON ALL INQUIRYS
COMPANY NO 025-2040-19-44C-28
ASSESSOR: PLEASE CHECK THE HEAVY EQUIPMENT LIST FOR ANY ITEMS THAT MAY HAVE BEEN SM PLATED OR LICENSED FOR THIS TAX YEAR. THANK YOU

CHOUTEAU COUNTY

1987 ASSESSMENT NOTICE OF REAL PROPERTY SUBJECT TO TAXATION

C.D.& D
% Marion Little, Sec.
3425 Tiger Dr.
Helena, Mont. 59601

Tax Roll Number: 8100
School District: #44C
Date: 05/12/87
Page: 1

From Land Value: 1,200.00

To Land Value: 1,200.00

From Improvements Value: 75,900.00

To Improvements Value: 75,900.00

Property Description and Location	Class Code Catagory	Tax-able %	Acres or Qty	Market Value	Taxable Value
Geraldine	4 3817 Industrial Improvements	3.860	.000	75900.00	2929.74
Office, Tanks, Bins,	4 2611 Industrial Land	3.860	.000	1200.00	46.32
Grain Storage	8 6514 Mfg. Machinery & Tools	11.000	.000	14054.00	1545.94
376-2040-19-44C-02					
47481000					
	Total of Class 4		.000	77100.00	2976.06
	Total of Class 8		.000	14054.00	1545.94
	Grand Total Of All Classes			91154.00	4522.00

A80

CHOUTEAU COUNTY

1987 ASSESSMENT NOTICE OF REAL PROPERTY SUBJECT TO TAXATION

Equity CO-OP
Elevator Co.

Geraldine,
MT. 59446

Tax Roll Number: 81100
School District: #44C
Date: 05/12/87
Page: 1

From Land Value: 2,000.00

To Land Value: 2,000.00

From Improvements Value: 394,033.00

To Improvements Value: 394,033.00

Property Description and Location	Class Code Catagory	Tax-Able %	Acres or Qty	Market Value
Geraldine Fertilizer Bulk Pl	4 3817 Industrial Improvements	3.860	.000	271500.00
Elevator Office, Store	4 3817 Industrial Improvements	3.860	.000	98600.00
Addition	4 3817 Industrial Improvements	3.860	.000	9273.00
152-2040-19-44C-10	4 2611 Industrial Land	3.860	.000	1000.00
152-2870-19-44C-12	4 2611 Industrial Land	3.860	.000	1000.00
47481100	8 6519 Supplies & Materials	11.000	.000	2500.00

	8 6511 Heavy Equip. & S.M. Equip.	11.000	.000	14970.00
	8 6514 Mfg. Machinery & Tools	11.000	.000	38330.00
	8 6514 Mfg. Machinery & Tools	11.000	.000	16281.00
	9 6311 Comm. Furn. & Fixtures	13.000	.000	5.00
9 6834	C.B. Radios & Mobile Phones	13.000	.000	1100.00
Tanks	4 3607 Comm. Improv. ON R/W	3.860	.000	14660.00
3149-01-4 -02-02-TK99 47481150				
	Total of Class 4		.000	396033.00
	Total of Class 8		.000	72081.00
	Total of Class 9		.000	1105.00
	Grand Total Of All Classes			469219.00

No. 90-1738

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

* * * * * * * * * *

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

* * * * * * * * * * * * * *

AFFIDAVIT

State of Montana)
) ss.
County of Fergus)

TRACIE LONG, being first dully sworn, says:

1. That she is the Assessor of Fergus County, Montana;

2. That the attached documents are property tax assessments for beneficial use of state owned railroad right-of-way and improvements on that railroad right-of-way for tax year 1987;

3. That this same state owned right-of-way and track is also used for railroad purposes by Central Montana Railroad;

4. That she has placed these same properties on the tax rolls in each subsequent tax year, up to and including the current 1991 tax year.

DATED this 21st day of May, 1991.

/s/ Tracie Long
Tracie Long

State of Montana)
) ss.
County of Fergus)

On this 21st day of May, 1991, before me a Notary Public for the State of Montana, personally appeared TRACIE LONG, the within instrument and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

(SEAL)

/s/ Karen Maseman
Notary Public for the
State of Montana
Residing at Lewistown
My Commission Expires:
7-18-93

1986 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION FERGUS COUNTY

****

***OWNER OF PARCEL ***OWNER INFORMATION ***

3553 84C

CENTRAL MONTANA RAILROAD *INDUSTRIAL**
%CARGILL, INCORPORATED ***GENERAL***
P O BOX 9300, DEPT5 **CORPORA-
MINNEAPOLIS MN 55440 TIONS**

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

CODE DESCRIPTION	PERCENTAGE	QUANTITY	MARKET	TAXABLE
2611 L INDUSTRIAL LAND	3.8600		1,900	73
	SUB-TOTAL		1,900	73
TOTAL THIS PARCEL-			1,900	73

ST YEAR-LAND MAREKT-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE

IS YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE
1900 73

****

IF ANY DISAGREEMENTS ARE FOUND WITH THIS
********** ASSESSMENT **********
THEY MUST BE REPORTED TO THE ASSESSOR WITHIN
********** TEN DAYS **********

****

THE COUNTY TAX APPEALS BOARD WILL MEET THE 3RD MONDAY IN APRIL TO HEAR ASSESSMENT & CLASSIFICATION APPEALS. IT WILL REMAIN IN SESSION UNTIL THE BUSINESS IS DISPOSED OF BUT NOT LATER THAN 60 DAYS AFTER THE DEPARTMENT OF REVENUE HAS -1- MAILED NOTICE OF ASSESSMENT TO ALL PROPERTY OWNERS, & -2- HAS NOTIFIED THE COUNTY TAX APPEAL BOARD THAT THE NOTICES HAVE BEEN MAILED, APPLICATIONS FOR VALUATION REDUCTION OR RECLASSIFICATION ARE AVAILABLE AT THE COUNTY ASSESSORS OFFICE & MUST BE FILED ACCORDING TO THE RULES SET FORTH ON OR BEFORE THE 1ST MONDAY IN JUNE OR 15 DAYS AFTER

RECEIVING A NOTICE OF ASSESSMENT FROM THE DEPT. OF REVENUE, WHICH EVER OCCURS LATER.

Land assessed separately per industrial bureau.

1986 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION FERGUS COUNTY

****

****OWNER OF PARCEL ****OWNER INFORMATION ****

378160 84F

CENTRAL MONTANA RAILROAD *INDUSTRIAL**
%CARGILL, INCORPORATED ***GENERAL***
P O BOX 9300, DEPT5 **CORPORA-
MINNEAPOLIS MN 55440 TIONS**

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

CODE DESCRIP-TION	PERCENT-AGE	QUAN-TITY	MAR-KET	TAX-ABLE
2611 L INDUSTRIAL LAND	3.8600		2,400	93
	SUB-TOTAL		2,400	93
TOTAL THIS PARCEL-			2,400	93

LAST YEAR-LAND MAREKT-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE

THIS YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE
2400 93

****

IF ANY DISAGREEMENTS ARE FOUND WITH THIS
********** ASSESSMENT **********
THEY MUST BE REPORTED TO THE ASSESSOR WITHIN
********** TEN DAYS **********
****

THE COUNTY TAX APPEALS BOARD WILL MEET THE 3RD MONDAY IN APRIL TO HEAR ASSESSMENT & CLASSIFICATION APPEALS. IT WILL REMAIN IN SESSION UNTIL THE BUSINESS IS DISPOSED OF BUT NOT LATER THAN 60 DAYS AFTER THE DEPARTMENT OF REVENUE HAS -1- MAILED NOTICE OF ASSESSMENT TO ALL PROPERTY OWNERS, & -2- HAS NOTIFIED THE COUNTY TAX APPEAL BOARD THAT THE NOTICES HAVE BEEN MAILED, APPLICATIONS FOR VALUATION REDUCTION OR RECLASSIFICATION ARE AVAILABLE AT THE COUNTY ASSESSORS OFFICE & MUST BE FILED ACCORDING TO THE RULES SET FORTH ON OR BEFORE THE 1ST MONDAY IN JUNE OR 15 DAYS AFTER RECEIVING A NOTICE OF ASSESSMENT FROM THE DEPT. OF REVENUE, WHICHEVER OCCURS LATER.

Land assessed separately per industrial bureau.

1986 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION FERGUS COUNTY

****

****OWNER OF PARCEL ****OWNER INFORMATION ****

383150 84F

CENTRAL MONTANA RAIL, INC	*INDUSTRIAL**
% HERSHBERGER, CURTIS	***GENERAL***
D/B/A NUTRO-GROW SERVICE	**GENERAL
DENTON MT 59430	PUBLIC**

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

24,500 SQ FT LEASE # CMR-00001
LOTS 118,120,122

CODE DESCRIPTION	PERCENTAGE	QUANTITY	MARKET	TAXABLE
2611 L INDUSTRIAL LAND	3.8600		735	28
	SUB-TOTAL		735	28
TOTAL THIS PARCEL-			735	28

LAST YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE

THIS YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE
735 28

****

IF ANY DISAGREEMENTS ARE FOUND WITH THIS
********** ASSESSMENT **********
THEY MUST BE REPORTED TO THE ASSESSOR WITHIN
********** TEN DAYS **********

****

THE COUNTY TAX APPEALS BOARD WILL MEET THE 3RD MONDAY IN APRIL TO HEAR ASSESSMENT & CLASSIFICATION APPEALS. IT WILL REMAIN IN SESSION UNTIL THE BUSINESS IS DISPOSED OF BUT NOT LATER THAN 60 DAYS AFTER THE DEPARTMENT OF REVENUE HAS -1- MAILED NOTICE OF ASSESSMENT TO ALL PROPERTY OWNERS, & -2- HAS NOTIFIED THE COUNTY TAX APPEAL BOARD THAT THE NOTICES HAVE BEEN MAILED. APPLICATIONS FOR VALUATION REDUCTION OR RECLASSIFICATION ARE AVAILABLE AT THE COUNTY ASSESSORS OFFICE & MUST BE FILED ACCORDING TO THE RULES SET FORTH ON OR BEFORE

THE 1ST MONDAY IN JUNE OR 15 DAYS AFTER RECEIVING A NOTICE OF ASSESSMENT FROM THE DEPT. OF REVENUE, WHICH EVER OCCURS LATER.

Land assessed separately per industrial bureau.

1986 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION FERGUS COUNTY

****

****OWNER OF PARCEL ****OWNER INFORMATION ****

383170 84F

CENTRAL MONTANA RAIL, INC *INDUSTRIAL**
% L P GAS & FERTILIZER ***GENERAL***
P O BOX 187 **GENERAL
LEWISTOWN MT 59457 PUBLIC**

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

CODE DESCRIPTION	PERCENTAGE	QUANTITY	MARKET	TAXABLE
2611 L INDUSTRIAL LAND	3.8600		1,307	50
	SUB-TOTAL		1,307	50
TOTALS THIS PARCEL-			1,307	50

LAST YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE

THIS YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE
1307 50

****

IF ANY DISAGREEMENTS ARE FOUND WITH THIS
********** ASSESSMENT **********
THEY MUST BE REPORTED TO THE ASSESSOR WITHIN
********** TEN DAYS **********
****

THE COUNTY TAX APPEALS BOARD WILL MEET THE 3RD MONDAY IN APRIL TO HEAR ASSESSMENT & CLASSIFICATION APPEALS. IT WILL REMAIN IN SESSION UNTIL THE BUSINESS IS DISPOSED OF BUT NOT LATER THAN 60 DAYS AFTER THE DEPARTMENT OF REVENUE HAS -1- MAILED NOTICE OF ASSESSMENT TO ALL PROPERTY OWNERS, & -2- HAS NOTIFIED THE COUNTY TAX APPEAL BOARD THAT THE NOTICES HAVE BEEN MAILED. APPLICATIONS FOR VALUATION REDUCTION OR RECLASSIFICATION ARE AVAILABLE AT THE COUNTY ASSESSORS OFFICE & MUST BE FILED ACCORDING TO THE RULES SET FORTH ON OR BEFORE THE 1ST MONDAY IN JUNE OR 15 DAYS AFTER RECEIVING A NOTICE OF ASSESSMENT FROM THE DEPT. OF REVENUE, WHICHEVER OCCURS LATER.

Land assessed separately per industrial bureau.

1986 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION FERGUS COUNTY

****

****OWNER OF PARCEL ****OWNER INFORMATION ****

401310 84A

CENTRAL MONTANA RAILROAD
% CARGILL, INCORPORATED
P O BOX 9300, DEPT.5
MINNEAPOLIS MN 55440

*INDUSTRIAL**
GENERAL
CORPORATIONS

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

CODE DESCRIP-TION	PERCENT-AGE	QUAN-TITY	MAR-KET	TAX-ABLE
2611 L INDUSTRIAL LAND	3.8600		1,700	66
	SUB-TOTAL		1,700	66
TOTALS THIS PARCEL-			1,700	66

LAST YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE

THIS YEAR-LAND MARKET-LAND TAXABLE-IMPS MARKET-IMPS TAXABLE-PERS MARKET-PERS TAXABLE
1700 66

****

IF ANY DISAGREEMENTS ARE FOUND WITH THIS
********** ASSESSMENT **********
THEY MUST BE REPORTED TO THE ASSESSOR WITHIN
********** TEN DAYS **********

****

THE COUNTY TAX APPEALS BOARD WILL MEET THE 3RD MONDAY IN APRIL TO HEAR ASSESSMENT & CLASSIFICATION APPEALS. IT WILL REMAIN IN SESSION UNTIL THE BUSINESS IS DISPOSED OF BUT NOT LATER THAN 60 DAYS AFTER THE DEPARTMENT OF REVENUE HAS -1- MAILED NOTICE OF ASSESSMENT TO ALL PROPERTY OWNERS, & -2- HAS NOTIFIED THE COUNTY TAX APPEAL BOARD THAT THE NOTICES HAVE BEEN MAILED. APPLICATIONS FOR VALUATION REDUCTION OR RECLASSIFICATION ARE AVAILABLE AT THE COUNTY ASSESSORS OFFICE & MUST BE FILED ACCORDING TO THE RULES SET FORTH ON OR BEFORE THE 1ST MONDAY IN JUNE OR 15 DAYS AFTER

RECEIVING A NOTICE OF ASSESSMENT FROM THE DEPT. OF REVENUE, WHICHEVER OCCURS LATER.

Land assessed separately per industrial bureau.

No. 90-1738

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

* * * * * * * * * *

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

* * * * * * * * * * * * *

AFFIDAVIT

State of Montana)
: ss.
County of Deer Lodge)

DEBBIE JURCICH, being first duly sworn, says:

1. That she is the Assessor of Deer Lodge County, Montana;

2. That the attached documents are property tax assessments for beneficial use of state owned railroad right-of-way and improvements on that railroad right-of-way for tax year 1987 for the improvements and 1988 for the lease sites.

3. That this same state owned right-of-way and track is also used for railroad purposes by RARUS Railroad;

4. That she has placed these same properties on the tax rolls in each subsequent tax year, up to and including the current 1991 tax year.

DATED this 3 day of June, 1991.

/s/ Debbie Jurcich
DEBBIE JURCICH

State of Montana)
: ss.
County of Deer Lodge)

On this ___ day of ___, 1991, before me a Notary Public for the State of Montana, personally appeared DEBBIE JURCICH, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

CLERK AND RECORDER
ANACONDA-
DEER LODGE COUNTY
ANACONDA, MT 59711
(SEAL)

/s/ Cheryl S. Beatty
Notary Public for the
State of Montana
Residing at Anaconda
My Commission Expires:
_____

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

** OWNER OF PARCEL ** OWNER INFORMATION **

546100 *COMMERCIAL* SCHOOL DISTRICT-10C

ST. OF MT., DEPT. OF COMMERCE
C/O ECK, THEODORE
1603 W. PARK
ANACONDA MT 59711-0000

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF ********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-2-25-01-L002

LEASE #73 RARUS RR R/W
SECT-3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2207 PROP TYPE-LAND DESCR-NON AG-COMMERCIAL

*BASE YEAR VALUE- 3,330

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	3,330	129
NET CHANGE-			3,330	129
GRAND TOTAL				
LAST YEAR-			0	0
THIS YEAR-			3,330	129
NET CHANGE-			3,330	129

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this

assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL*** OWNER INFORMATION ***

67200 *COMMERCIAL* SCHOOL DISTRICT-10C

ECK, ANNA S.
1603 WEST PARK ST
ANACONDA MT 5-9711

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-2-25-01-0001

WAREHOUSE

CLASS CODE- 4 PROP CODE-3507 PROP TYPE-IMPS DESCR-IMPS CITY/TOWN LOTS COMMERCIAL

*BASE YEAR VALUE-

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600		
THIS YEAR-		3.8600	9,081	351
NET CHANGE-				
GRAND TOTAL				
LAST YEAR-				
THIS YEAR-			9,081	351
NET CHANGE-				

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 – from 1987 Assessment.

1987 assessments did not show Base Year Value nor last year value so the computer filled these fields. DJ 6/4/91

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

*** OWNER OF PARCEL *** OWNER INFORMATION ***

546200 *COMMERCIAL* SCHOOL DISTRICT-10C

ST. OF MT., DEPT. OF COMMERCE
C/O BECK DIST.
2000 HOLMES
BUTTE MT 59701-0000

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-L001

LEASE #305 RARUS RR R/W
SECT-3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2207 PROP TYPE-LAND DESCR-NON AG-COMMERCIAL

*BASE YEAR VALUE- 1,236

	QUAN-TITY	PERCENT-AGE	MAR-KET	TAX-ABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	1,236	48
NET CHANGE-			1,236	48
GRAND TOTAL				
LAST YEAR-			0	0
THIS YEAR-			1,236	48
NET CHANGE-			1,236	48

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL *** OWNER INFORMATION ***

15200 *COMMERCIAL* SCHOOL DISTRICT-10C

BECK, MARVIN C.
DISTRIBUTING INC.
C/O 2000 HOLMES AVE
BUTTE MT 5-9701

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-0001

IMP'S ON B.A. & P. RWY LAND
BULK PLANT

CLASS CODE- 4 PROP CODE-3507 PROP TYPE-IMPS DESCR-IMPS CITY/TOWN LOTS COMMERCIAL

*BASE YEAR VALUE-

	QUAN-TITY	PERCENT-AGE	MAR-KET	TAX-ABLE
LAST YEAR-		3.8600		
THIS YEAR-		3.8600	54,854	2,117
NET CHANGE-			41,902	
GRAND TOTAL				
LAST YEAR-				
THIS YEAR-			54,854	2,117
NET CHANGE-				

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 from 1987 assessments – Building.

1987 assessments did not show base year nor last year value so the computer filled these fields. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

** OWNER OF PARCEL ** OWNER INFORMATION **

546300 *COMMERCIAL* SCHOOL DISTRICT-10C

ST. OF MT., DEPT. OF COMMERCE
C/O SCHMIDT, WILLIAM
1709 W. PARK
ANACONDA MT 59711-0000

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-L003

LEASE #312 RARUS RR R/W
SECT- 3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2207 PROP TYPE-LAND DESCR-NON AG-COMMERCIAL

*BASE YEAR VALUE- 1,080

	QUAN-TITY	PERCENT-AGE	MAR-KET	TAX-ABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	1,080	42
NET CHANGE-			1,080	42
GRAND TOTAL				
LAST YEAR-			0	0
THIS YEAR-			1,080	42
NET CHANGE-			1,080	42

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

A100

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL*** OWNER INFORMATION ***

242100 *COMMERCIAL* SCHOOL DISTRICT-10C

SCHMIDT PLUMBING & HEATING CO.
1709 WEST PARK ST
ANACONDA MT 59711

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF ********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-0003

WAREHOUSE ON WEST COMMERCIAL

CLASS CODE- 4 PROP CODE-3507 PROP TYPE-IMPS DESCR-IMPS CITY/TOWN LOTS COMMERCIAL

*BASE YEAR VALUE-

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600		
THIS YEAR-		3.8600	4,185	162
NET CHANGE-				
GRAND TOTAL				
LAST YEAR-				
THIS YEAR-			4,185	162
NET CHANGE-				

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this

assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 from 1987 assessments

1987 assessments did not show Base Year Value nor Last Year Value so the computer filled these fields. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

*** OWNER OF PARCEL *** OWNER INFORMATION ***

546400 *COMMERCIAL* SCHOOL DISTRICT-101

ST. OF MT., DEPT. OF COMMERCE
C/O SUTEY OIL CO.
2000 HOLMES
BUTTE MT 59701-0000

TAXPAYER NUMBER
SUBURBAN
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF ********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-L004

LEASE #342 AND 343 RARUS RR R/W
SECT- 3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2107 PROP TYPE-LAND DESCR-NON AG-COMMERCIAL

*BASE YEAR VALUE- 347

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	347	13
NET CHANGE-			347	13

GRAND TOTAL		
LAST YEAR-	0	0
THIS YEAR-	347	13
NET CHANGE-	347	13

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL*** OWNER INFORMATION ***

315500 *COMMERCIAL* SCHOOL DISTRICT-101

BROOKS, PHYLLIS M. &
SUTEY, DAVID L.
2000 HOLMES AVE
BUTTE MT 5-9701

TAXPAYER
NUMBER
SUBURBAN
**GENERAL
PUBLIC**

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-0004

WAREHOUSE & BULK GAS BLDG ON BAP R/W

CLASS CODE- 4 PROP CODE-3307 PROP TYPE-IMPS DESCR-ALL IMPS-ON COMMERCIAL

*BASE YEAR VALUE-

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600		
THIS YEAR-		3.8600	5,147	199
NET CHANGE-				
GRAND TOTAL				
LAST YEAR-				
THIS YEAR-			5,147	199
NET CHANGE-				

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 from 1987 assessment.

1987 assessments did not show Base Year Value nor Last Year Value so the computer filled these fields. DJ 6/4/91

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

*** OWNER OF PARCEL*** OWNER INFORMATION ***

546500 *COMMERCIAL* SCHOOL DISTRICT-101

ST. OF MT., DEPT. OF COMMERCE
C/O PARK MOTORS
300 E. COMMERCIAL AV
ANACONDA MT 59711-0000

TAXPAYER NUMBER
SUBURBAN
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-L002

LEASE #344 RARUS RR R/W
SECT- 3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2107 PROP TYPE-LAND DESCR-NON AG COMMERCIAL

*BASE YEAR VALUE- 404

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	404	16
NET CHANGE-			404	16
GRAND TOTAL				
LAST YEAR-			0	0
THIS YEAR-			404	16
NET CHANGE-			404	16

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL *** OWNER INFORMATION ***

317900 *COMMERCIAL* SCHOOL DISTRICT-101

PARK MOTORS OF ANACONDA
300 EAST COMMERCIAL AVE
ANACONDA MT 59711

TAXPAYER NUMBER
SUBURBAN
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-01-0002

WAREHOUSE ON CHERRY ST

CLASS CODE- 4 PROP CODE-3307 PROP TYPE-IMPS DESCR-ALL IMPS-ON COMMERCIAL

*BASE YEAR VALUE-

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600		
THIS YEAR-		3.8600	7,456	288
NET CHANGE-				
GRAND TOTAL				
LAST YEAR-				
THIS YEAR-			7,456	288
NET CHANGE-				

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this

assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 from 1987 assessment.

1987 assessments did not show Base Year Value nor Last Year Value so the computer filled these fields. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

*** OWNER OF PARCEL *** OWNER INFORMATION ***

546600 *COMMERCIAL* SCHOOL DISTRICT-10C

ST. OF MT., DEPT. OF COMMERCE
C/O A-1 BUILDING
1918 TAMMANY
ANACONDA MT 59711-0000

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF ********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-05-L002

LEASE #351 RARUS RR R/W
SECT- 3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2207 PROP TYPE-LAND DESCR-NON AG-COMMERCIAL

*BASE YEAR VALUE- 2,194

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	2,194	85
NET CHANGE-			2,194	85

GRAND TOTAL		
LAST YEAR-	0	0
THIS YEAR-	2,194	85
NET CHANGE-	2,194	85

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL*** OWNER INFORMATION ***

12900 *COMMERCIAL* SCHOOL DISTRICT-10C

BEALL'S BUILDING CENTER
1918 TAMMANY AVE
ANACONDA MT 59711

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-05-0002

WAREHOUSE & LUMBER STORAGE BLDGS
ON ANACONDA CO LAND
B.A. & P. R/W

CLASS CODE- 4 PROP CODE-3507 PROP TYPE-IMPS
DESCR-IMPS CITY/TOWN LOTS COMMERCIAL

*BASE YEAR VALUE-

	QUANTITY	PERCENTAGE	MARKET	TAXABLE
LAST YEAR-		3.8600		
THIS YEAR-		3.8600	19,728	762
NET CHANGE-				
GRAND TOTAL				
LAST YEAR-				
THIS YEAR-			19,728	762
NET CHANGE-				

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 from 1987 assessments.

1987 assessments did not show Base Year Value nor Last Year Value so the computer filled these fields. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/04/91

****

*** OWNER OF PARCEL *** OWNER INFORMATION ***

546700 *COMMERCIAL* SCHOOL DISTRICT-10C

ST. OF MT., DEPT. OF COMMERCE
C/O A-1 BUILDING
1918 TAMMANY
ANACONDA MT 59711-0000

TAXPAYER NUMBER
CITY LOT
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

GEO-CODE NUMBER-1285-03-1-29-05-L001

LEASE #513 RARUS RR R/W
SECT- 3 TWNSHP- 4N RANGE-11W

CLASS CODE- 4 PROP CODE-2207 PROP TYPE-LAND DESCR-NON AG-COMMERCIAL

*BASE YEAR VALUE- 904

	QUAN-TITY	PERCENT-AGE	MAR-KET	TAX-ABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	904	35
NET CHANGE-			904	35
GRAND TOTAL				
LAST YEAR-			0	0
THIS YEAR-			904	35
NET CHANGE-			904	35

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/4/91 from 1988 assessment – land. DJ

1991 ASSESSMENT NOTICE OF PROPERTY SUBJECT TO TAXATION ANACONDA-DEER LODGE
6/03/91

****

*** OWNER OF PARCEL*** OWNER INFORMATION ***

544900 *COMMERCIAL* SCHOOL DISTRICT-10C
RARUS RAILWAY CORPORATION TAXPAYER
300 WEST COMMERCIAL AVE NUMBER
ANACONDA MT 59711 **CITY LOT**
GENERAL PUBLIC

****

THE FOLLOWING IS A DESCRIPTION OF
********** YOUR HOLDINGS **********

OLD BAP DEPOT ON NORTH MAIN
SECT- 3 TWNSHP- 4 RANGE- 11

CLASS CODE- 4 PROP CODE-3307 PROP TYPE-IMPS DESCR-ALL IMPS-ON COMMERCIAL

*BASE YEAR VALUE- 44,003,852

	QUAN-TITY	PERCENT-AGE	MAR-KET	TAX-ABLE
LAST YEAR-		3.8600	0	0
THIS YEAR-		3.8600	23,045	890
NET CHANGE-			23,045	890
GRAND TOTAL				
LAST YEAR-			0	0
THIS YEAR-			23,045	890
NET CHANGE-			23,045	890

You have the right to appeal this assessment pursuant to 15-15-102, MCA. Please see the attached/enclosed sheet for a more detailed explanation of your legal rights regarding this

assessment. If this is a revised assessment, please refer to 15-8-601, MCA.

THIS IS NOT A TAX BILL

Printed 6/3/91 from 1987 assessments.

1987 assessments did not show Base Year Value nor Last Year Value so the computer filled these fields. DJ

No. 90-1738 (5)

Supreme Court, U.S.
FILED
SEP 17 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

Thomas H. Nelson*
James C. Paine
STOEL RIVES BOLEY
JONES & GREY
900 SW Fifth Ave., Suite 2300
Portland, OR 97204
Telephone: (503) 224-3380

Donald R. Murray, Jr.
MURPHY, ROBINSON,
HECKATHORN & PHILLIPS
431 First Ave., West
PO Box 769
Kalispell, MT 59903
Telephone: (406) 752-6644

Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. Retroactive State Legislation 3

B. Limited Scope of Prior Decisions 5

C. The STAB Decision 5

CONCLUSION 7

TABLE OF CASES AND AUTHORITIES

Page

Cases

Larson v. State, 166 Mont. 449, 534 P.2d 854 (1975) 6, 7

Pacific Power & Light Co. v. Montana Dep't of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990) . . 1, 5

Peretti v. State, 238 Mont. 239, 777 P.2d 329 (1989) 8

Phillips Chem. Co. v. Dumas Indep. School Dist., 361 U.S. 376 (1960) 4

Portland Gen. Elec. Co. v. Montana Dep't of Revenue, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990) . . 1, 5

United States v. City of Manassas, Va., 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988) 4

Statutes and Rules

Mont. Code Ann. § 15-24-1203 (1989) 1, 4

Chapter 621, 1991 Mont. Laws 1, 4

U.S. Supreme Court Rule 22.5 1

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 22.5 of this Court's rules requires that a brief in response to a brief in opposition to a petition for certiorari address "arguments first raised in the brief in opposition." The state of Montana ("State"), acting through the Montana Department of Revenue ("Department"), here posits three new justifications for the Montana Supreme Court's decision that upheld the imposition of beneficial-use taxes on Petitioners. Those grounds are not only novel, they are demonstrably wrong. The State's erroneous arguments are:

(1) that the Montana Legislature's April 24, 1991 enactment of Chapter 621, 1991 Mont. Laws, retroactively amending the State's beneficial-use tax statute, Mont. Code Ann. § 15-24-1203 (1989), eliminated the basis for a claim that the State discriminates against those who contract with the federal government;

(2) that the 1989 Montana Supreme Court decisions in *Pacific Power & Light Co. v. Montana Dep't of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990) ("*Pacific Power I*"), and *Portland Gen. Elec. Co. v. Montana Dep't of Revenue*, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990) ("*PGE*"), addressed (a) the constitutionality of the disproportionate taxes imposed on Petitioners consequent to the Department's new "50 percent at the bottom" methodology, and (b) the excessive taxes imposed consequent to the Department's failure to include in its calculations tax-exempt federal transmission capacity between the Garrison substation and the Idaho border; and

(3) that the State Tax Appeals Board ("STAB") asserted jurisdiction over constitutional issues as a part of its review of contested assessment methodology and that, therefore, those constitutional issues are now pending before the Montana Supreme Court in Petitioners' appeal from the STAB order.[1]

Unless this Court grants review, Petitioners will suffer the imposition of tens of millions of dollars of contested beneficial-use taxes without having obtained impartial judicial review of their significant constitutional claims.

---

[1] The Department makes several other new arguments that, while erroneous, do not directly involve issues of constitutional significance. First, the Department erroneously asserts that Petitioners are the largest providers of electric power in the State. Department Brief in Opposition at i & 6. This is not so; by any measure, the two largest providers of electric power in Montana are the Montana Power Company (a Petitioner) and the Montana-Dakota Utilities Company (not a Petitioner). Pacific Power & Light Company (a Petitioner) serves only a small segment of territory in the northwest corner of the State. Second, the Department overstates the scope of contractual rights Petitioners have negotiated with the Bonneville Power Administration ("BPA") when it asserts that Petitioners can use the federal transmission facilities "to the exclusion of all others for the entire life of those power lines." *Id.* at i. This statement wilfully ignores such transactions as the BPA's transmission of WAPA power to the Central Valley Project in California. Finally, although not technically an error, the State's insertion of non-record material into its appendix (*e.g.*, the assessors' lists of "users" of state-owned railroad rights-of-way) violates the most basic notions of appellate review.

ARGUMENT

The State of Montana has gone to extraordinary lengths to prevent Petitioners from obtaining from this Court an impartial assessment of the challenged beneficial-use tax. These efforts, involving all three branches of government, unwittingly highlight the importance of the issues presented in the pending petition.

A. Retroactive State Legislation.

The Department cites the Montana Legislature's April 24, 1991 amendment to the Montana beneficial-use statute as justifying its argument that the State does not discriminate against those who contract with the federal government. Department Brief in Opposition at 12 & n.9. The chronology itself should spark interest: The amendment occurred just when Petitioners were putting the final touches on their petition for certiorari, *i.e.*, long after Petitioners informed the Montana Supreme Court that that court had relied upon a mistaken premise in arriving at its decision, *viz.*, that only nonprofit entities leased State-owned railroad property. *See* App. A21, A23-A24. Of course, instead of addressing its mistake, the Montana Supreme Court simply denied the petition for rehearing without opinion. App. A47. Even though the Montana Supreme Court appeared to sink into embarrassed silence, there obviously was *some* communication among the State's governmental branches, for the Montana Legislature crafted a fix; specifically, it changed the beneficial-use statute retroactively to exempt from taxation lessees of

federally owned railroad property.[2] The cynicism of these efforts is reflected by the fact that there neither were nor are any lessees of federally owned railroad property in Montana; this retroactive amendment can have *no* effect whatsoever upon the imposition or collection of beneficial-use taxes.

In sum, instead of addressing the substance of Petitioners' claim--that the State cannot favor its own lessees while inflicting taxes on those who contract to transmit power over federal facilities[3]--the Montana Supreme Court evaded the issue first by relying upon a demonstrably false rationale, *viz.*, that all lessees of state railroad property are nonprofit organizations. When the error of that position was pointed out and an opportunity given to correct or clarify its decision, the Montana Supreme Court sat in silence. Realizing the infirmity in the opinion of its sister branch, however, the Montana Legislature then improvised an amendment to the beneficial-use statute that was designed solely to deflect attention from the State's discriminatory tax structure. These concerted, cooperative inter-branch shenanigans again highlight the immense difficulty Petitioners have encountered in obtaining a fair and impartial adjudication of their

---

[2] As noted in the State's brief at 12 n.9, the Montana Legislature enacted Ch. 621, 1991 Mont. Laws, which inserted the words, "owned by the United States" after the words "right-of-way or track" in the State's beneficial-use tax statute, Mont. Code Ann. § 15-24-1203.

[3] *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960); *United States v. City of Manassas, Va.*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988).

significant constitutional challenges. The State of Montana knows that its beneficial-use statute cannot survive the scrutiny that this Court would give it, and therefore it can only try to distract.

B. Limited Scope of Prior Decisions.

The Department's second novel-but-wrong assertion is that two discrete constitutional claims that arose first in tax years subsequent to those involved in *Pacific Power I* and *PGE* had in fact been decided in those two prior cases. *See* Department Brief in Opposition at 11. Those claims challenge (1) the Department's new "half at the bottom" approach--a methodology that always imposes higher taxes on users of federally owned property than those users would have paid had they owned property outright--and (2) the Department's failure to account for tax-exempt federal transmission facilities between Garrison and Taft in calculating the amount of Petitioners' beneficial-use taxes on those particular facilities. Neither of these claims arose until the 1986 tax year; indeed, the Department did not even commence imposing beneficial-use taxes on account of the Garrison-Taft transmission facilities until 1986. Therefore, the State's assertion that these issues were addressed and decided in the prior litigation is flatly wrong.

C. The STAB Decision.

The Department's third new argument, also utterly lacking in foundation in the record, is its assertion that the questions of unconstitutional discrimination are not ripe for review because they were first presented to STAB, as opposed to the

District Court, and that the STAB decision is awaiting judicial review in State court. Department Brief in Opposition at 14-16. The Department's manifest error--indeed, its deception--can be readily perceived with no more than a reading of the STAB decision, reprinted at App. A92. The STAB decision addressed only one issue: Assuming that the beneficial-use taxes are constitutional, could the State legitimately impose beneficial-use taxes on the Garrison-Taft facilities in tax year 1986? Constitutional issues were never even presented to STAB.

A sense of how far the Department (and, by extension, the State) will go to avoid this Court's review can be gained by examining the Department's own contradictory arguments to the Montana Supreme Court. In its August 10, 1990 brief to the Montana Supreme Court in this docket, the Department argued that all constitutional issues must be presented to the judiciary because STAB's jurisdiction is limited to reviewing methodological, as opposed to constitutional, questions. In support of its argument, the Department cited with approval the following quotation from *Larson v. State*, 166 Mont. 449, 534 P.2d 854 (1975):

> "Tax appeal boards are particularly suited for settling disputes over the appropriate valuation of a given piece of property or a particular improvement, and the judiciary cannot properly interfere with that function. *Blair v. Potter*, 132 Mont. 176, 315 P.2d 177. The instant case does not concern the value of a specific tract of land within Lewis and Clark County, but rather the constitutional and statutory correctness of implementing a dis-

> criminatory reappraisal. That determination is an appropriate function of the courts." Id. at 166 Mont. 457, [534 P.2d 854 (1975)].

Department Brief to Montana Supreme Court at 20-21 (Aug. 10, 1990). In contrast to its present brief to this Court, the Department did not try to confuse the Montana Supreme Court by arguing that a variety of claims had been presented to STAB; there, the Department told the Montana Supreme Court the truth:

> The Colstrip owners were content to present one challenge to the State Tax Appeal Board. That question was whether the 1986 beneficial use assessments for the Garrison to Taft 500 kv facilities were appropriate. They waived any and all other methodological and statutory challenges.

Department Brief to Montana Supreme Court at 23 n.29. In sum, all constitutional issues raised in Petitioners' complaint were presented to the Montana judiciary in the first instance, and all of those issues are therefore now ripe for review.

CONCLUSION

All three governmental branches of the State of Montana have combined in an effort to prevent this Court from considering the important constitutional issues raised by the State's unprecedented imposition of beneficial-use taxes on federal electric power transmission facilities. First, the judicial branch refused to consider two critical new constitutional claims and, when it did consider a third claim, it relied exclusively on an erroneous assumption of fact

that was not even mentioned in the record of the proceedings below. Given a chance to correct, explain or clarify its error, however, the Montana Supreme Court simply shrugged and turned away.

The judicial silence spurred the legislative branch to action; knowing that no legal rationale could overcome the Montana Supreme Court's obvious error, the Montana Legislature retroactively changed the beneficial-use statute in a transparent attempt to fool this Court into believing that the beneficial-use statute no longer discriminates against those who contract with the federal government. The amendment, however, changed nothing; the State will lose not one cent in tax revenue.

Finally, the executive branch, acting through the Department, is willing to adopt contradictory positions and arguments before different tribunals depending solely upon its perception of partisan advantage. For example, it told the Montana judiciary that all constitutional issues were ready for that court's determination and that STAB cannot hear constitutional issues. Now, however, the Department attempts to lead this Court into error by asserting that STAB heard the constitutional challenges and that those challenges will not be ripe until judicial review of the STAB decision is completed. In addition, the Department now tells this Court that constitutional claims that first arose in 1986 somehow had been decided in litigation involving the 1984 and 1985 tax years. Only two years ago, a member of the Montana Supreme Court remarked, "One has to be fast to keep up with this Court." *Peretti v. State*, 238 Mont. 239, 246, 777 P.2d 329, 334 (1989) (Sheehy, J., dissenting). The efforts expended by the State to preclude Peti-

tioners from obtaining meaningful judicial review suggest that Justice Sheehy's remark can safely be applied to all three branches of State government.

The constitutionality of Montana's beneficial-use tax experiment is far too important a question to be buried under a pile of hastily concocted ex-post rationalizations. Petitioners have paid over $20 million into the coffers of the State; in return, they desire nothing more than one tribunal willing to give full and fair consideration of their federal constitutional claims. The record in this docket, together with the State's new arguments in opposition to review, establishes that Petitioners are simply unable to obtain such a review in the State's court

system. For these reasons, Petitioners respectfully urge this Court to grant the requested petition for certiorari.

DATED: September 17, 1991.

Respectfully submitted,

Thomas H. Nelson
James C. Paine
STOEL RIVES BOLEY
JONES & GREY
900 SW Fifth Ave., Suite 2300
Portland, OR 97204
Telephone: (503) 224-3380

Donald R. Murray, Jr.
MURPHY, ROBINSON,
HECKATHORN & PHILLIPS
431 First Avenue, West
PO Box 769
Kalispell, MT 59903
Telephone: (406) 752-6644